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Debo Awofeso

Southampton Student Law Review, Editor-in-Chief

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Foreword

As always this year's edition of the *Southampton Student Law Review* contains an exciting mixture of papers reflecting a wide variety of research interests. For the first time this year it also includes papers from external contributors, which will broaden the range of the articles and also help to raise awareness of the work beyond the confines of the Southampton community.

This issue focuses broadly on areas of commercial law, spanning the Rotterdam Rules, free movement of goods, copyright law and issues surrounding insurance and re-insurance. The authors offer analyses of these issues from a largely doctrinal perspective and develop critiques based on their own interpretations of the areas they problematise. For instance, the controversy surrounding the impact on the UK standard of originality in relation to copyright following EU provisions for harmonisation is discussed in detail, exposing concerns about the judicial approach to this area. Similarly, a comparative analysis of UK and Australian law surrounding the duty of disclosure in insurance contracts, reveals concerns about the probity and effectiveness of the UK provisions. Insurance law in the context of pollution is also the focus of a case comment on the decision of the House of Lords in *Wasa International Insurance Co Ltd v Lexington Insurance Co* [2009] UKHL 40, that the reinsurers were not liable to indemnify the insurers. There is a cluster of pieces on the related issues of free movement of goods and carriage of goods by sea and the Rotterdam Rules, which together explore some fundamental questions about the nature of law in this area and whether it is about discrimination and anti-protectionism about economic freedom. It will be interesting to see whether the expectation that the Rotterdam Rules will be ratified eventually comes to fruition.

I am once again impressed by the standard of work produced by the students who have contributed to this volume of the *Southampton Student Law Review*. I would like to thank the editors for their hard work in its production, and commend the authors for their diligence and scholarship.

Hazel Biggs

Professor of Healthcare Law & Bioethics

Head of Southampton Law School

July 2015

The Duty of Pre-Contractual Disclosure in English Insurance Law: Past and Future – Does the Law Need to be Changed?

Laura Reeves
University of Southampton

Currently UK insurance law as a whole is subject to reform and change. One particularly interesting change surrounds the duty of pre-contractual disclosure. Royal Assent has been given to the Insurance Law Act 2015 (in force from August 2016) whereby the law should become more consumer-friendly and less draconian in practice. Such change in the law is interesting because other countries such as Australia, have implemented similar rules much earlier than the UK, in which bears a good comparison as to how well the new rules will be enforced in practice. For this reason, a contrast will be drawn between English and Australian law to analyse the strengths and weaknesses in both jurisdictions to formulate what could be an adapted version of the pre-contractual duty of disclosure.

Keywords: pre-contractual disclosure, utmost good faith, Insurance Act 2015, insurance reform

Introduction

The duty of pre-contractual disclosure has a significant impact on the existence of the insurance contract in insurance law. The stringent, unfair burden placed on the insured to disclose all relevant “material circumstances”¹ coupled with the “draconian, one way”² avoidance remedy³ calls for the duty to undergo drastic reform. This reform has been acknowledged and accepted by the Law Commission and both Houses of Parliament, whereby new laws will come into force by the end of 2016. This essay will analyse the current law, the new law reforms⁴ and compare then to Australian law, which undertook similar reform some years ago. The

¹ Marine Insurance Act 1906 S.18

² K Lewins, ‘Going Walk about with Australian Insurance Law: The Australian experience of reforming utmost good faith’ (2013) 1 JBL, 1-22, 2

³ Marine Insurance Act 1906 S.17

⁴ For clarifications purposes, references to the current law describes the law which is in place now and references to the new law refers to the reforms which have been passed as legislation under the Insurance Act 2015.

second half of the essay will explore the aspects of the new law and formulate a “desired” approach to the pre-contractual duty of disclosure.

A conclusion will then be drawn based on the following statement: the current test appears to rationalise the law on materiality from the point of view of the insurer, leaving an onerous burden on the insured to disclose all information necessary to prevent avoidance of the insurance policy. The Insurance Act 2015 attempts to balance this burden by making the insurer a more active part of the pre-contract process, however how far this will work in practice depends on the interpretation and implementation of the doctrine. Only time will tell if the reforms will work within a commercial context.

English Law

Historic Development

The pre-contractual duty of disclosure derives from the principle of utmost good faith.⁵ The English legal system does not provide a basis for an overriding duty of good faith. However, the development of insurance law is one of the few areas of law that upholds such a duty. This was demonstrated by Lord Mansfield in *Carter v Boehm*⁶ who said that “...the governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows...”⁷ This has been codified in the Marine Insurance Act 1906 (MIA)⁸ under section 17, and if this is not observed by either party the contract can be avoided.

Section 18 goes on to provide for the duty of disclosure. It states that every material circumstance has to be disclosed to the insured, whereby “every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.”⁹ Material circumstance has been the prominent talking point when it comes to pre-contractual disclosure, because the test that has been established does not cement a specific approach in determining what would be material. For example, in *Ionides v Parker*¹⁰ a strict objective test through the eyes of the reasonable prudent underwriter was evoked. This is an impossibly high standard to meet, where the insured does not have the level of knowledge the insurer would have in relation to the requirements of insurance law. However, this was rejected in *Berger v Pollock*¹¹ where there was consideration for what the actual insurer would have done. The criticism here is that the judge in this case had no power to change the statutory provision in this way.¹² Such development in the law has involved two main issues: how should material

⁵ Each party to the contract has to act with honesty, accuracy and in a responsible way in order to act with utmost good faith as per *Carter v Boehm* [1766] Burr 1905

⁶ [1766] 3 Burr 1905

⁷ *Carter v Boehm* [1766] 3 Burr 1905, 1910 per Lord Mansfield

⁸ The Marine Insurance Act 1906 is traditionally relevant only to Marine Insurance, however, the duty of pre-contractual disclosure applies to all insurance contracts.

⁹ Marine Insurance Act 1906 S.18(2)

¹⁰ [1874] LR 9 QB 531

¹¹ [1973] 2 Lloyd’s Rep 442

¹² This point being made clear in the decision in *Pan Atlantic Ins. Co. v Pine Top Ins. Co* [1955] 1 AC 501, HL

circumstance be judged and what degree of materiality is needed to demonstrate that it affected the decision made?

The Current Law Today

The uncertain road map drawn out between the decisions in *Ionides v Parker* and *Berger v Pollock* has somewhat been clarified in the leading decision in *Pan Atlantic Ins. Co v Pine Top Ins. Co (Pan Atlantic)*.¹³ The case itself involved a set of complicated facts, however the judgment is where the importance lies. The decision developed a two-limb test incorporating objective and subjective elements, in the determination of materiality.

The first element involves what the hypothetical prudent underwriter would expect to have in front of them when making a decision. This is the same approach taken in cases such as *Ionides v Parker*. The added element is the second limb, which involves subjective inducement. That being how the actual underwriter, within the facts of the case, would be influenced by the information that was not disclosed. Similar to that of the approach used in *Berger v Pollock*, and a clear demonstration how the development in the law is somewhat uncertain.

The level of inducement has also been a talking point. In *Pan Atlantic* it was decided on a 3-2 majority decision that the lack of disclosure did not have to change the outcome of the decision made by the insurer. Disclosure has to be of any facts that can change the thought process of the underwriter when considering the risk at hand, however it does not have to change the outcome of the decision made. Such a standard is incredibly difficult to meet; the standard is at a level higher than it should be, given the bargaining power between the parties. The insured should not have to meet an unreasonable standard such as disclosing anything that could change the thought process of a decision, as this could range from the smallest detail to the fundamental aspects that could alter the nature of the risk significantly.

By contrast, the dissenting minority opinion of the judges felt the actual underwriter did not have to be decisively influenced by the information not disclosed. Thus meaning the insured only has to disclose really important information to the insurer. As a layperson, this approach is more logically sound and user-friendly compared to the majority's decision. It enables reasonableness to be applied to the information needed to be disclosed. Equally it can prevent a waste in time and resources, from the point of view of the insurer, who ultimately will have to determine what information given is relevant to the valuation of the policy. That being said, the decision is interesting because from an early stage, judgments have demonstrated the split view on the delicate balance insurance law should be making between protecting the insured and insurer's interest. The majority in this instance has favoured the insurer too much, which is surprising, because it is the insured who is the weaker party, and who should be protected by the laws in place.

Following this, inducement has come to be determined on expert evidence given by the actual underwriter. There has also been the suggestion that presumptive inducement can be relied on where actual underwriters are unable to give expert evidence at the trial. In *St Paul Fire & Marine Ins. Co v McConnell Dowell*

¹³ [1955] 1 AC 501, HL

Contractors Ltd,¹⁴ only three of the four underwriters could give evidence at the trial on the level of inducement involved in the case. The Court took this to presume that the missing underwriter would be able to rely on section 18, as the majority of the underwriters had been heard from in the case. This seems procedurally appropriate in cases where an underwriter is deceased or is not contactable. However, such presumptions could potentially lead to inaccurate outcomes, in relation to the level of inducement the court infers from the facts of the case. This seems to be the concern within the law, because subsequent case law seems to suggest presumptions will not be relied upon in a general sense.

For example, in *Assicurazioni Generali v ARIG*, presumptive inducement was rejected, as the insurer should have to prove how far induced they were to make a decision. Such a decision suggests presumed inducement can only be acceptable for procedural necessities where the underwriter either cannot be there to give evidence or cannot be found.

Finally, remedies under the MIA are extremely restrictive in nature, because only avoidance¹⁵ of the policy is available. The right to damages has repeatedly been rejected by the Court of Appeal.¹⁶ This is considered draconian¹⁷ in nature because avoidance means that all premiums are paid back¹⁸ to the insured, and the policy does not exist. This is particularly problematic when a claim has been made in a commercial context in relation to certain equipment that a business relies on for primary sources of income. Not only will any damage/breakage of the machine not be covered under the insurance, the underlying policy will no longer exist either. In some cases this leaves the policyholders with nothing, which is somewhat unfair especially when the non-disclosure had no malicious or fraudulent intent behind it.

However, recent decisions such as *Sealion Shipping Ltd, Toisa Horizon Inc v Valiant Insurance Co*¹⁹ suggested, even before the proposed reforms gained Royal Assent, that the burden of proof on materiality had become an obstacle for the insurers to automatically avoid the contract. In this case, general non-disclosure was not enough to demonstrate materiality, suggesting that the courts were already taking note of what would have been Law Commission reform discussions at the time.

Issues With the Test and How it Works

The test developed in *Pan Atlantic* carries with it a lot of debate. The significant issues will be discussed here, namely the burden put on the insurer in terms of the subjective and objective elements, the lack of knowledge the insured has compared to the insurer, and the stringent remedy imposed as a result of non-disclosure.

Elements of the *Pan Atlantic* Test

¹⁴ [1993] 2 Lloyd's Rep. 503

¹⁵ Marine Insurance Act 1906 S.17

¹⁶ *Banque Keyser v Skandia* [1990] 1 QB 665, 781 Slade LJ

¹⁷ K Lewins, 'Going Walk about with Australian Insurance Law: The Australian experience of reforming utmost good faith' 1 JBL 2013, 1-22

¹⁸ *Chapman v Fraser* [1973] Park 456

¹⁹ [2012] EWHC (Comm)

There are evident strengths and weaknesses of the test. Firstly, there needs to be recognition that the restrictive nature of the remedy does pose difficulties for the doctrine because of the consequences it holds (the remedy will be looked at in detail later on). However, it also has the potential to create a deterrent especially in cases involving fraudulent non-disclosure. Such a punitive remedy would make the insured rethink withholding information. On the other hand, this is irrelevant if the insured is not aware of the intricate nature of disclosure requirements. This leads to the criticisms within the law.

The test identifies a strong bias in favour of the insurer. It is fair to say that both the objective and subjective elements demonstrate that the courts consider materiality based on what the insurer expects. Take for instance, the law of inducement, from cases such as *St Pauls Fire & Marine Insurance Co v McConnell Dowell Contractors Ltd*.²⁰ This shows inducement involves the insurers giving evidence about what he would have done if he had the information. This is somewhat artificial²¹ because an underwriter's evidence could be unreliable as the insurance company will be pushing for avoidance of the policy. It would be unfair to allow the test to be solely based on what an insurer would have done. The law implies that it is there to protect the insurer. Even though, in most circumstances, it is the insurer who has both access to the knowledge of the market and legal advice in relation to insurance law.

The definition of an insurance contract, although not codified, takes on the characteristics of a contract where both parties agree to set terms in exchange for covering the risk of something occurring in the future. This would explain why the insurer is protected to a high standard. However, such a discourse of action could result in disproportionate burdens among the parties, which is not desirable in maintaining an appropriate balance of protection between the insurer and insured.

In stark contrast, Australian Law presents pre-contractual non-disclosure, based on the insured's viewpoint. Section 21(1) of the Insurance Contract Act 1986 (ICA) says:

“Whereby the potential insured must disclose every matter that it knows will be relevant to the decision of whether the insurer will accept the risk; and

A reasonable person in the circumstance could be expected to know [it] to be a relevant matter.”

This test is based on the insured's knowledge of disclosure²² and restricts the level of disclosure to the facts of the case at hand. Basing the test around what the insured ought to disclose, compared to what the insurer expects to know, is a more reasoned starting point because they are the party with less knowledge in terms of what is required within insurance law. However, if questions arose around knowledge, would the insurer be at an unfair disadvantage in relation to the subjective element of the Australian test? Additionally, referring to “relevant” information seems to imply that information relevant to the risk is what is considered, not “every material fact.”²³ In

²⁰ [1993] 2 Lloyd's Rep. 503

²¹ G Blackwood, ‘The pre-contractual duty of (utmost) good faith: The Past and the Future’ (2013) LMCLQ 311-324, at p.319

²² Permanent Trustee Australia Co Ltd v FAI General Insurance Co Ltd (2001) 50 NSWLR 67

²³ As in the Marine Insurance Act 1906 S.18

*Permanent Trustee Australia Co Ltd v FAI Insurance Co Ltd*²⁴ it was held that relevant facts are confined to what is relevant in terms of the risk in question, it does not extend to irrelevant information. This seems an appropriate approach to take in terms of assessing the information not disclosed, and prevents overuse of the doctrine in situations where the insurer wants to merely avoid the contract.

Knowledge of the Insured

Moving on from the Australian position back to English law, Fletcher Moulton LJ has stated that: “Few of those who [are] insured have any idea how completely they leave themselves in the hands of the insurers should the latter wish to dispute the policy.”²⁵

This is relevant to non-disclosure because English law presents an unreasonably high standard of disclosure, sometimes based on knowledge the insured will not have. Firstly, it can be said such a standard is “harsh” to the innocent insured, in relation to the consequences of non-disclosure. For example in *Lambert v Co-operative Insurance Society*,²⁶ the claimant suffered a loss of jewellery at her jewellery store. However as she failed to disclose her husband’s prior prison convictions in handling stolen goods, the policy was avoided. There is no disputing that such information should have been disclosed. However there is room to argue that it is unfair to impose such a high burden on individuals who do not know they have to disclose certain information. It would be cruel to punish those who are simply innocently ignorant of the legal requirements and protect the institutes who are fully aware of the requirements, where there is no sign of malicious practise on the insured’s part. How is the insured supposed to know what is to be disclosed without some form of guidance? Therefore, the knowledge of the insured would be an ideal way to determine what the insured ought to know to disclose.

This demonstrates the dynamics of the contractual relationship between the insurer and the insured. Insurance policies tend to be of a standard form, with little negotiation within the pre-contractual stages. On face value, the insurer has all the control in this respect, therefore it is shocking and also disproportionate to allow the law to protect the dominant party as it does.

Some have disagreed with this, namely, Guy Blackwood in 2013,²⁷ who feels that judges can reject the remedy where they feel it is too draconian. However, how true is this, where there are only two options for the court to choose from? Avoidance of a policy is at one end of the spectrum. However, potentially enforcing the payment of an insurance claim which the insured may not be strictly entitled to is at the other. A solution that can balance both of the competing interests at stake needs to be sought.

Secondly, such a standard encourages “data-dumping”.²⁸ Data-dumping is the process where the insured presents the insurer with every fine detail of information (relevant or not) in order to prevent section 18 applying. This seems a logical step to take, from the perspective of the insured, because it is the policyholder who stands to

²⁴ [2003] 197 ALR 364

²⁵ *Joel v Law Union and Crown Insurance Company* [1908] 2 KB 863 at p.885

²⁶ [1975] 2 Lloyd’s Rep 485

²⁷ G Blackwood, ‘The pre-contractual duty of (utmost) good faith: The Past and the Future’ (2013) LMCLQ, 311-324, at p 319

²⁸ In which was described by the Law Commission, in July 2014 as a problem with the current law on the duty of non-disclosure.

lose all insurance cover, if non-disclosure can be proven. However, as a result of such precautions, there is potential that the efficiency of the insurance market will suffer. Even though there is no firm evidence of this, insurers could be spending their time and resources considering all the data presented to them. Even though data-dumping prevents non-disclosure from occurring, it also allows the insurance market to factor such practices into premium prices. This would again be onerous for the insured; the burden on the insured is present in terms of pecuniary payments made to the insurer.

Remedies

Knowledge also poses challenges when considering the intentions of the insured and the remedies available under the MIA. For example, a fraudulent non-disclosure is deliberate and inexcusable and should result in avoidance. However, an innocent non-disclosure consists of no fault in relation to the insured but results in the same remedy- avoidance of the policy. Should this result in the same remedy as fraudulent non-disclosure? Simply put, no! Consideration of the intentions of the insured would go a great way in rectifying the strict remedy applicable to pre-contractual non-disclosure.

The main problem with the remedy is that it leaves two outcomes. Firstly, the insurer can avoid the contract, so that the insurance policy no longer exists. This is not always the most practical solution when considering longstanding business contracts insurance companies may have. However, particular non-disclosure can alter the severity of the risk undertaken; therefore the premium prices may not reflect the risk taken on by the insurer. Alternatively, the insurer could pay the claim in full. This could result in overcompensation if the insurer would have truly charged a higher premium, given the disclosure of the information.

Under Australian Law, the ICA section 28 provides two types of remedies dependent on the type of non-disclosure for both consumer and commercial insurance policies. For example, innocent non-disclosure would not result in avoidance of the contract, but would result in a reduction in the claims payable by the insurer, whereas fraudulent non-disclosure would result in avoidance. It seems this would be calculated based on what the insurer would have been willing to pay had the failure not occurred.²⁹ This demonstrates a balance between the interests of the insurer and the insured, and this approach seems appropriate to mitigate the consequences of non-disclosure. However, would it be appropriate in English law, given consumer insurance is governed under different sets of rules? If the intention was to use similar remedies, why not allow commercial contracts to be governed by the same reforms as consumer insurance policies?

Under English law, consumer contracts are now governed under the Consumer Insurance (Disclosure and Representations) Act 2012. The Act implements these classifications for remedies in relation to consumers. Consumers are those who are persons entering into insurance contracts for “purposes unrelated to the individual’s trade, business, or profession,”³⁰ explicitly demonstrating that these rules do not apply in the commercial context. The level of knowledge a consumer has compared to a business may differ considerably. Therefore, proportionate remedies for innocent

²⁹ Insurance Contract Act 1986 S.28(3)

³⁰ Ibid, S.1(a)

non-disclosure by consumers seem suitable. However, as large corporate firms have the money and power to challenge issues of non-disclosure, it could become difficult, distinguishing between pleading the innocent party and devious malpractice.

Reform – How Does it Relate to Current Law?

English law has already gone through significant reform in the last two/three years. For example, the Consumer Insurance (Disclosure and Representations) Act 2012 replaces section 18 of the MIA all together, but this Act is specific to consumer insurance only, and does not apply to commercial insurance. This initially implies a different route would be taken with commercial insurance policies.

Consumer insurance reform brought about changes such as the removal of a positive duty of non-disclosure, and elimination of punishment for innocent misrepresentations. In comparison, business insurance still relies on the MIA (including section 18). But the Insurance Act 2015³¹ will change the law on pre-contractual disclosure (in relation to business insurance), bringing it more in line with the Consumer Insurance (Disclosure and Representations) Act 2012. This is surprising because as will be shown, similar rules will be adopted for commercial insurance, begging the question- was it necessary to create a whole new Act when the Consumer Insurance Act 2012 could have been applied to commercial insurance policies too?

What Will Change under the Insurance Act 2015 in Relation to Business Insurance?

Firstly, section 18 of the MIA will be replaced by section 3 of the Insurance Act 2015 from August 2016. It introduces a duty of fair representation. It will merge disclosure and misrepresentation rules into a holistic duty, where the overall information presented to the insurer will be assessed on how fair a representation was made. This is somewhat pro-insured, because even if you miss a piece of information that would have been considered relevant under section 18, this may not affect how fair the representation is as a whole.

That being said, arguably the most significant³² part of the reform surrounds remedies. The reform introduces the idea of proportionate remedies,³³ something that seems to be lacking in insurance law as a whole.³⁴ The changes are as follows:

- i) If the breach is deliberate or reckless, then the insurer may avoid the policy and does not have to return premiums.³⁵
- ii) Where breaches are either innocent or negligent:

³¹ Which use to be the Insurance Bill [HL] Bill 39 55/4 2014/15

³² G Blackwood, 'The pre-contractual duty of (utmost) good faith: The Past and the Future' (2013) LMCLQ 311-324, at p 318

³³ Insurance Act 2015, Schedule 1, Part 1, s.2-6

³⁴ B Soyer, 'Reforming pre-contractual information duties in business insurance contracts—one reform too many?' [2009] JBL 15.

³⁵ Insurance Act 2015, Schedule 1, Part 1, s.2

- a. If the insurer would not have entered into the contract, then he may avoid the contract but must return premiums.³⁶
- b. If the insurer would have entered into the contract but on different terms, the contract will be treated as though they were based on the different terms.³⁷
- c. If the insurer would have entered into the contract but would have charged a higher premium, the insurer can reduce the claim proportionately to the premium it would have charged.³⁸

This suggests that remedies will be presented on the basis of how the insurer would have responded, if he had that information to begin with. It seems that this approach encourages the use of causation when considering remedies and focuses on what would have happened “but for” the insurer not having the information in front of him.³⁹ The incorporation of contract law doctrines, such as causation, seems logical because of its established routes and practices within the consideration of remedies in contract.

How Effective Will the Insurance Act 2015 Be?

Fair Representation

It is difficult to determine how successful this will be in practice and there have been some suggestions by commentators that strong possibilities of litigation⁴⁰ will arise, because of the unanswered questions surround what a fair representation is. However it does seem to attempt to balance the unfair burden placed on the insured under section 18. The problem that may arise is that the insurer could possibly be more cautious in providing insurance to applicants. This could lead to an increase in premium prices (generally) to absorb the risk of any non-disclosures that will not affect how fair the representation is as a whole.

However, such a duty suggests an implication that the insurer should be more proactive in obtaining the information necessary to make an assessment of risk. This would make the practice of the insurance market more efficient because insurers will be obtaining the information they need rather than encouraging “data-dumping”⁴¹ There is room to argue that insurers should have a more active role in order to make the market as efficient as possible.⁴² Without case law to demonstrate such events, caution should be presented here. A proactive encouragement in terms of the insurer would make obtaining information more efficient; however without it being an explicit obligation which results in consequences if not followed, it may not make it

³⁶ Ibid at s.4

³⁷ Ibid at s. 5

³⁸ Ibid at s. 6(1)

³⁹ B Soyer, ‘Reforming pre-contractual information duties in business insurance contracts—one reform too many?’ [2009] JBL 15, at p 319

⁴⁰ J Hjalmarsson, ‘The Insurance Act 2015 – a new beginning or business as usual?’ (2015) 15(2) Shipping and Trade Law 5

⁴¹ Data-dumping is a generic term used when policyholders present a bundle of information to the insurer with both relevant and irrelevant information to prevent non-disclosure from occurring under Section 18 of the MIA

⁴² R Hasson, ‘The Doctrine of *Uberrima Fides* in Insurance Law – A Critical Evaluation’ (1969) 32 Mod L Review 615

as effective as it could be. Currently, waiver can be obtained through affirmation⁴³ or estoppel under the doctrine of utmost good faith. However, there is scope to introduce waiver in the context of obtaining information. The insurer should be obliged to ask questions to seek information. If this does not occur, then this should impliedly show that the insurer waives the right to avoid the contract if non-disclosure becomes an issue. This would place a deterrent on the insurer, because it places responsibility on them to obtain the necessary information needed to assess the risk accurately.

But what will happen if the insurer actively seeks information but it still not disclosed by the insured? It would appear this is where remedies will seek to distinguish the severity of non-disclosure. If the insured has been prompted specifically, would this be considered a deliberate non-disclosure? These are questions which derive from the introduction of the new law.

A fair representation retains the idea of the disclosure of information.⁴⁴ Disclosure is presented similarly to how Australians deal with the matter, because there seems to be consideration for what the insured ought to know.⁴⁵ In contrast, the Insurance Act also retains the idea of material circumstance.⁴⁶ Even though not explicit in the Act, this could imply a similar approach to the test under *Pan Atlantic*. This demonstrates an attempt to bring a balance into English law too. There will be consideration for both what the insured ought to know, as well as what the insurer would expect to know. But from a layman's perspective, incorporating the insured's knowledge into the law could still seem quite complicated to understand. It is still unclear as to what the requirements would be under the clause. Therefore, the reforms would rely on common law development, potentially leading to decisions such as the one in *Pan Atlantic*, which could complicate the understanding of a fair representation.

Remedies

Under the Insurance Act 2015, the remedies available maintain considerations from the point of view of the insurer. This is logical because the insurer is the only one who knows if something would have been decided differently had they had certain information made available to them. Providing different remedies, based on the nature of the non-disclosure, has the potential to balance the interests of the insured and insurer.⁴⁷ Alternatively, it could reintroduce the idea of insurers artificially exaggerating their reactions (had they had the information), in order to avoid the contract under schedule 1, section 4. It would be interesting to see what safeguards will be incorporated to establish what the insurer would have done. Will it be an objective approach or a combination of objective and subjective elements? Will it be the use of what the market insurer would have done? Or would it be a subjective approach (based on the *actual insurer* in the circumstances?)

⁴³ Authority deriving from *Moore Large & Co. Ltd v Hermes Credit & Guarantee PLC* [2003] Lloyd's Rep IR 315

⁴⁴ Insurance Act 2015 s.3(1)(a)

⁴⁵ *Ibid*, s.3(4)(a)

⁴⁶ *Ibid*

⁴⁷ D Hertzell, 'The effect of the Insurance Act' (2015) Post Magazine, Feb 12, 27

A subjective approach could lead to the scenario above, where the *actual insurer* would have exaggerated their reactions had they had the information. Alternatively, an objective approach would gain insight from the insurance market. Obtaining such information objectively would be the most practical progression because the use of the market insurer brings with it independence and neutrality from the *actual insurer*. One consideration that could be had here is that a bias could be met even with the use of the market insurer, if there is a consensus that the insurance market as a whole will “stick together”.

A New Test?

The discussion above shows that there are merits in the reform that will take place in the coming year. However, it seems that the English approach to the reforms still present numerous questions on the pre-contractual duty of non-disclosure.

Previously it exerted an onerous burden on the insured to disclose information that may not be obvious to share, resulting in an inflexible remedy of avoidance. By considering the reforms, elements of knowledge of the insured have been added to the test, coupled with the new doctrine of fair representation. On the surface, it seems to eliminate most of the issues established under section 18 of the MIA. However, it still does not present a user-friendly interpretation. For example, what knowledge should the insured have? Will *Pan Atlantic* still be relied on to determine material circumstance? Judges in the first case to be heard under the new reforms will have an interesting time determining these points.

A “Desired” Test

This next section will examine a test that could be suitable for dealing with non-disclosure. It will do this by considering all the different aspects mentioned throughout to formulate a “desired” test.

Australia approach non-disclosure from the general perspective of the insured, and add in considerations of the insurer when tackling the issue of remedies. This has been considered a “neat solution”⁴⁸ in dealing with non-disclosure issues. One criticism that could derive from the Australian approach is that the insured is generously favoured when applying the test for non-disclosure under statute. Therefore even though a good starting point, there needs to be consideration for the insurer here too. This could be done by using a more proactive approach in obtaining information (something that has been impliedly suggested in the reforms).

Australian law is also currently based on what the insured thinks is relevant and knows. This will be dependent on knowledge; however, what if this can be complemented with an insurer’s duty to prompt disclosure by asking questions? Some insurers, for example in car insurance, seek information based on specific systems of assessment,⁴⁹ and it seems unfair to expect the insured to know this, whereas it would take nothing for the insurer to be obliged to actively seek the information to prevent avoidance of the contract in the long term. Therefore, a

⁴⁸ K Lewins, ‘Going Walk about with Australian Insurance Law: The Australian experience of reforming utmost good faith’ (2013) 1 JBL 1-22, at p 2

⁴⁹ This was suggested in *Drake Insurance v Provident Insurance* [2003] EWCA Civ 1834, [2004] QB 601 at [140] to [141] by Clarke LJ

suggestion would be to require the insurer to prompt disclosure by asking relevant questions in relation to information they need to assess risk. This coupled with the test being based on the viewpoint of the insured introduces a balance between the burdens put on both the insurer and the insured.

The remedy available has also been a talking point throughout. Before the new 2015 Act, English law only provided for avoidance, which is not suitable where the insured is not acting dishonestly or fraudulently. This has also been commented on by judges time and time again. For example, in *Kausar v Eagle Star Insurance Co Ltd*⁵⁰ Staughton LJ stated:

Avoidance for non-disclosure is a drastic remedy. It enables the insurer to disclaim liability after, and not before, he has discovered that the risk turns out to be a bad one; it leaves the insured without the protection which he thought he had contracted and paid for... I consider there should be some restraints on this doctrine.⁵¹

Staughton LJ makes a perfectly valid point here. It seems non-disclosure is relied upon to protect the insurer from a “risk that turns out to be a bad one.” In *Noble v Kennoway*,⁵² Lord Mansfield emphasised that the insurer is presumed to know the practices of the trade he insures and if he does not, then it is up to him to find out.⁵³ It seems somewhat unusual for a party to a contract to retain such protection, where they could alleviate such risk by asking the appropriate questions, especially when they are presumed to know the practices of the trade. The insurer is in a position to know the information needed to make a fair representation; therefore it seems unusual not to acknowledge this within the law to prevent non-disclosure disputes from arising. This seems an obvious development of the law, because it would enable relevant information to be obtained. The insurer should not be able to rely on such a provision where they could have prevented non-disclosure from occurring.⁵⁴

But what if the underwriter does not always carry sufficient training and knowledge?⁵⁵ Does placing such a burden on the insurer distort the balance too far in favour of the insured? It would be interesting how far the application of assumed knowledge on the insurer’s behalf will be enforced by the courts. To hold underwriters to a high standard imposes obligations on both parties which is desirable. It is not unduly unreasonable to assume they know the industry they work in. If such a standard did not exist, there would be little confidence in the insurance market as a whole.

Similarly, there are two possible approaches that could be used to restrain the doctrine, as suggested by Staughton LJ. Firstly, proportionate remedies would restrict the reliance of avoidance as the only remedy.⁵⁶ The alternative would be to

⁵⁰ [2000] Lloyd’s Rep I R 154

⁵¹ *Ibid*, 157

⁵² [1999] Eng. Rep 326

⁵³ *Kausar v Eagle Star Insurance Co Ltd* [2000] Lloyd’s Rep I R 154 at 326

⁵⁴ J Lowry, ‘Whither the Duty of Good Faith in UK Insurance Contracts’ (2010) 16 Connecticut Insurance Law Journal 97

⁵⁵ D Hertzell, ‘The effect of the Insurance Act’ (2015) Post Magazine, Feb 12, 27

⁵⁶ The approach adopted by the Insurance Act 2015 in Schedule 1, Part 1

classify claims, like the Australian system. Either way, the perspective is going to have to be from the point of view of the insurer, because they are responsible for setting the premiums and assessing the risk in all cases. When dealing with such issues, the Courts will have to consider how to regulate the evidence given by the insurer.

A suggestion here would be to develop the idea of either type of remedy based on an objective approach. There is no doubt that the insurer is the party who holds the key to what he would have done if he had certain information; it would be unwelcome to consider any other viewpoint. However, subjective elements could lead to an undesired result (as demonstrated above). This would suggest that the use of an independent market insurer to determine what he would have done if he had the information to begin with, would be a better alternative. There is room to argue that a market-based insurer could still exaggerate premiums on the basis that insurers stick together. Also the market itself works on a spectrum from common every-day insurance (for example car insurance) whereby there will be a lot of different opinion that could be sought, to specialised markets whereby a few if not one insurer will provide insurance policies.

Contrastingly, the advantage of this is that the opinion would be based on what the market represents, even if it is in a specialised field. Rather than what an individual insurer would do in order to avoid policies, an inevitable objective of the insurance company if a dispute of this kind ends up in court. Decisions based on what the market would do as a whole will be more accurate to rely on in future decisions, because in theory they should be free from bias, based on characteristics and facts of a specific case.

Conclusion

There is still a lot of debate around the pre-contractual duty of non-disclosure. For many years, the law has protected the insurer to a considerably high standard, allowing the burden to be placed on the insured to disclose all the relevant information needed to prevent avoidance of the policy occurring.

The Law Commission, like many other critics, evidently saw a problem with this. The reforms, on face value, do not present a perfect answer to the regulation of the doctrine of utmost good faith. However, changes to the law will go some way to bring a balance between the interests of the insurer and insured.

Specific to English law, the strengths deriving from the new changes lay firmly within considerations of what the insured knows to be relevant to disclose. However, the approach taken by introducing a duty of fair representation seems to be no less confusing from the point of view of the insured. It seems the only consolation here is the insurer is being prompted to be more proactive in the obtaining of information. However, it is unclear whether this should be a legally binding duty.

Building on this, the reform surrounding remedies seems to strike a fair balance between the insured and insurer, but again there are still questions as to fairness in

calculating the remedies. That being said, the use of “proportionately”⁵⁷ is a desirable outcome of the reforms, because innocent policyholders are being treated differently to fraudulent policyholders. This is appropriate, due to the severity of the umbrella remedy of avoidance currently used under the English legal system.

Until the new laws are put into practice, there will be numerous questions as to how effective both the English and Scottish Law Commissions’ work and the reforms will be. But what is known is that the current law is not fulfilling the full potential that it could. It would be easy to say this approach should be taken and this remedy adopted, without considering the application on a practical level. In theory, the balance being struck between the insurers and insured within the reforms is a desired outcome. The test presents better protection for the insured, which should be the aim of the doctrine of fair representation. Similarly, the remedies are to be more flexible in nature, proportionately protecting the insurer where information has not been disclosed. However, only time will tell whether the reforms will be successful in practice.

⁵⁷ Insurance Act 2015, Schedule 1, Part 1, s.2-6

Comment on the Decision of the House of Lords in *Wasa International Insurance Co Ltd v Lexington Insurance Co* [2009] UKHL 40

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Introduction

The article discusses the House of Lords' decision in the 2009 case *Wasa International Insurance Co Ltd v Lexington Insurance Co*¹ hereinafter called "*Wasa v Lexington*", in which arose disputes regarding which law would be applied to the interpretation of the reinsurance contract, where the primary insurance and facultative proportional reinsurance, with an "as original" clause, were governed by different law. Further, this article will assess the reasonableness of the House of Lords' decision by comparing it with a previous influential case *Vesta v Butcher*² in similar circumstances.

Background

On 30 July 2009, the House of Lords issued judgment in *Wasa v Lexington*. In this case, the insurer ("Lexington", a Massachusetts insurer) provided cover to the assured ("Alcoa") under an American "all risks difference in conditions" (DIC) property damage insurance policy, for a three-year period from 1st July 1977. Two London reinsurers ("Wasa" and "AGF") reinsured Lexington with a 2.5% line on the proportional facultative reinsurance slip for the same period covering "All Risks of Physical Loss or Damage...&/or as original".

The assured was required to incur some clean-up costs because they caused pollution with long-term effects of damage from 1946 to 1990. The assured sued the insurer at the Supreme Court of Washington, which adopted Pennsylvania law under which the insurance policy was to be construed as covering damage to property occurring both before and after the stated period of cover, provided that some of the damage occurred during the period of cover. Therefore the court's decision exposed Lexington to liability against Alcoa for this pollution, despite the fact that the

¹ [2009] UKHL 40

² Forsikringsaktieselskapet Vesta v Butcher [1989] 1 All ER 402

reinsurance period was for only 36 months. As a result of the judgment, Lexington paid Alcoa and NWA some US\$103 million.³

However, Wasa and AGF refused to indemnify Lexington. They maintained that the reinsurance, as a matter of English law, only covered property damage during the period of cover.⁴ Then a coverage dispute arose between these parties because of different principles of construction between English law and Pennsylvania law.

Appeal History

In 2007, after the Supreme Court of Washington's judgment, the reinsurers ("Wasa" and "AGF") began the proceeding seeking declarations that they were not liable to indemnify the defendant ("Lexington") under the reinsurance contract. Lexington counterclaimed for an indemnity or damages in respect of a settlement which it reached with Alcoa, and legal costs incurred by it in defending Alcoa's claim. In this litigation, Simon J at first instance gave judgment in favour of the reinsurers, because at the time the reinsurance contract was made there was no certainty either as to where an underlying claim would be made or which law would be applied.⁵

In 2008, the reinsured appealed against the decision of the High Court. The Court of Appeal allowed Lexington's appeal and held that the reinsurers were liable. One reason is that on the basis of the principle that the law of a contract is that with which it has its closest and most real connection, one would probably conclude that it was the law of the state of Pennsylvania, since that is where Alcoa was incorporated and had its centre of business.⁶ It might therefore be deduced that at the time when the reinsurance was written, those parties would have anticipated that the applicable law of the direct policy would be the law of the state of Pennsylvania.

In 2009, the reinsurers appealed against the decision of the Court of Appeal. The House of Lords held that the reinsurers were not liable because they were not presumed to know the applicable law. In the following, focus is placed on the speeches given by Lord Phillips and Lord Mance.

The House of Lords' Decision and Analysis

Lord Mance analysed that the issue in this case is whether certain financial consequences can be passed by a Massachusetts insurer to two London reinsurers. In short, the key question is whether the English law reinsurance follows the American insurance.⁷ Regarding this issue, Lord Phillips held that the reinsurers were not liable to indemnify the insurer.

³ *Wasa* (n 1) [18]

⁴ *ibid* [18]

⁵ *Wasa International Insurance Company Limited v Lexington Insurance Company* [2007] EWHC 896 (Com) [45]

⁶ *Wasa International Insurance Company Ltd v Lexington Insurance Company* [2008] EWCA Civ 150 [28] (Longmore LJ)

⁷ *Wasa* (n 1) [18] (Lord Mance)

One fundamental concept⁸ related to the issue mentioned above is the nature of reinsurance, which was intrinsic to reinsurance law and had created some uncertainty in a core area of reinsurance like the incorporation of governing law. In this case, their Lordships adopted the view that the nature of reinsurance is a further insurance of the subject matter insured in the original insurance contract, rather than an insurance of the liability of the reinsured.⁹ Since reinsurance is a further insurance of the subject matter insured in the primary insurance contract, insurance and reinsurance should be interpreted separately, which means that the interpretation of the primary policy should not bind the reinsurers. In this case, the reinsurance policy falls to be construed under English law.¹⁰ By contrast, if reinsurance contracts are recognised as liability insurance rather than further insurance, *Wasa* and *AGF* should be held liable, since the insurer was held liable in the judgment of Washington Supreme Court.

In addition, the circumstance in this case was discussed in comparison with two similar cases, *Vesta* and *Catatumbo*.¹¹ The reason why the decisions in these two previous cases were not applied in *Wasa v Lexington* is, from the Judges' point of view, that the original policy contained a service of suit clause, which provided that "...Insured, will submit to the jurisdiction of any Court of Competent jurisdiction within the United States...".¹² To be more specific, with the service of suit clause in *Wasa v Lexington*, the assured can bring an action against the insurer in any competent jurisdiction within the United States, which means that the applicable law was not ascertainable when the reinsurance contract was made. Therefore reinsurers were not presumed to know the applicable law of the original insurance contract, whereas in *Vesta* we can presume that the reinsurers know the applicable law, since Norwegian law governed the primary insurance and the parties to the reinsurance contract were deemed to have used the same dictionary- a Norwegian legal dictionary- to ascertain the terms and conditions.¹³

As a result, the choice of the law of the state of Pennsylvania to govern *Lexington's* insurance of *Alcoa* cannot be regarded as in any sense predictable at the time when the reinsurance was placed, or as following from the operation of the terms of the insurance as a contract independent of all the other insurance contracts.¹⁴

With the reasons mentioned above, their Lordships concluded that the two London reinsurers were not liable.

Comments

As stated in the judgment, the service of suit clause in *Wasa v Lexington* was a reason why the House's decision in *Vesta* was not applied in this case. In my opinion, the effect of the service of suit clause is just to declare that litigation could take place

⁸ O Gurses, 'Facultative Reinsurance and the Full Reinsurance Clause' (2008) LMCLQ 366

⁹ *Wasa* (n 1) [2] (Lord Phillips)

¹⁰ *Wasa* (n 1) [2] (Lord Phillips)

¹¹ *Groupama Navigation et Transports v Catatumbo CA Seguros* [2000] 2 Lloyd's Rep 350

¹² *Wasa* (n 1) [100]

¹³ *Vesta* (n 2) 911 (Lord Lowry)

¹⁴ *Wasa* (n 1) [49]

in any competent jurisdiction in the United States, rather than ruling out the established principle in *Vesta*.

Another reason stated is that *Vesta* was concerned with the effect of breaches of warranty, which has long been recognised as unduly stringent and in need of review.¹⁵ I think this is neither relevant to the issue discussed in this case nor the reason why the reinsurance contract was interpreted in Norwegian law in *Vesta*.

It is to be welcomed that the reinsurance slip would be treated by the primary insurance policy's governing law by virtue of the "back-to-back" nature of the reinsurance.¹⁶ This principle was established in a previous influential case *Vesta* and should have been also applied in *Wasa v Lexington* since relevant background and surrounding circumstances are identical in essence.

The first similarity is that the focus of the dispute was arising from the same fact that the primary insurance and reinsurance were governed by different laws. Secondly, the reinsurance contracts involved were both proportional facultative contracts.

Furthermore, both of the reinsurance contracts contained the words "as original". The term "All risks of physical loss or damage...&/or as original" in this case was an indication as to the scope of coverage under the reinsurance and incorporated the relevant insurance provisions relating to the subject matter and risks into the reinsurance. Therefore, the established principle in *Vesta* should also apply in *Wasa v Lexington* since there was no substantial difference between them. So it would have been more reasonable to hold the two reinsurers liable in this case.

Conclusion

In the context of reinsurance, the House of Lords' decision in *Wasa v Lexington* that the two London reinsurers were not liable to indemnify the insurer is controversial and questioned, since it conflicted with the principle established in *Vesta* and triggered disputes concerning construction of facultative proportional contract when the governing law of primary insurance and reinsurance were different.

In this case, it could be suggested to construe the reinsurance policy identically to the direct policy, because the wording in the reinsurance policy indicated that the reinsurers had this intention. Further, the reinsurers' argument on uncertainty were misconceived because the fact that the direct policy contained a floating choice of law clause did not in fact render the initial applicable law any more uncertain.¹⁷ The above analysis indicates that it is the Court of Appeal's decision that can most appropriately be regarded as reasonable.

¹⁵ *Wasa* (n 1) [50]

¹⁶ *Vesta* (n 2)

¹⁷ Gurses (n 8) 386

A Critical Assessment of the Rotterdam Rules' Potential to be Ratified, in Light of the Proposed Multimodal Transportation System and the Proposed Changes to the Obligations and Liability of the Carrier

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The laws that govern the international operation of carriage of goods by sea are of ongoing concern to those within the industry that it affects. With the established Hague-Visby Rules showing their age with every passing year, it has become increasingly apparent that a fresh construction of the law must be created, in order to ensure a system of law that reflects the changes within the industry and in technology. This paper seeks to assess the changes proposed in the Rotterdam Rules, including the introduction of a multimodal transportation system and the proposed amendments to the obligations and liability of the carrier; for example, the extension of the obligation of seaworthiness and the proposed removal of the nautical fault exception. This paper concludes with the prediction of the successful ratification of the Rotterdam Rules in light of the largely balanced nature of its provisions.

Introduction

In a world that relies heavily upon the shipping industry,¹ it has become increasingly apparent that the law that currently governs international carriage of goods by sea is unsatisfactory and in need of reform. This system includes primarily: the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading² (hereafter the Hague Rules), the Visby Amendments to the Hague Rules³ (hereafter the Hague-Visby Rules) and a variety of national laws, some of which incorporate the Hamburg Rules,⁴ forming a hybrid system. As a result of this fragmentation, the *United Nations Convention on Contracts for the*

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¹ R Ortiz, 'What Changes in International Transport Law after the Rotterdam Rules?' (2009) Rev dr unif 893, 893

² Aug. 25, 1924, 120 LNTS 187, 51 Stat 233

³ Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968, Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1979

⁴ United Nations Convention on the Carriage of Goods by Sea Dec. 9 1993, U.N. Doc. A/RES/48/34

International Carriage of Goods Wholly or Partly by Sea (hereafter the Rotterdam Rules) was drafted in the hope of creating a more uniform, modern and certain system of law for international carriage of goods by sea.⁵

The Rotterdam Rules were adopted by the General Assembly of the UN in December 2008 and a signing ceremony took place in 2009, whereby 24 states signed the rules. With this in mind, in the last five years only three states have ratified the Convention,⁶ despite the fresh approach offered in relation to a number of different legal issues, including the long anticipated acknowledgement of the legal effect of electronic transportation documents⁷ and the imposition of new obligations upon the shipper due to the carrier, for example the introduction of volume contracts.⁸ Whilst these provisions are important, it is submitted that potential success of the convention is dependent upon the reception of two distinct aspects of the Rotterdam Rules: the new multimodal transportation element of the convention⁹ and the changes to the liability of the carrier.¹⁰

This paper shall seek to critically assess these changes, in order to establish whether or not they are an improvement upon the situation as it currently stands under the Hague-Visby Rules, which will be the primary source of comparison in this paper, as they are currently the pre-dominant system of international carriage of goods by sea law. It shall then assess, as a result of these changes, whether or not the new Rotterdam Rules are likely to be ratified by the additional 17 countries needed in order to come into force. The paper shall begin by assessing the introduction of a multimodal system of transport, which it is submitted is the key element of the Rotterdam Rules, due to the benefits it will provide all parties to a shipping contract. It shall then progress to looking at the effect and application of the Hague-Visby Rules in relation to the treatment of carrier liability, beginning with an analysis of the extension of the obligation of seaworthiness, before proceeding to review the changes to the list of exceptions available to carriers in the event of damage or loss; looking in particular at the effect of the proposed removal of the nautical fault exception and the suggested amendments to the fire exception.

It shall then move on to assess the implications of the addition of liability for delay in delivering goods, where it will compare the provision provided by the Hamburg Rules, to the new provision under the Rotterdam Rules, before turning a critical eye to the minor adjustments made to a carrier's ability to limit liability. It shall then finally survey the primary changes in the law that provide carriers benefit, including

⁵ C. Aguirre, 'The Rotterdam Rules from the Perspective of a Country that is a Consumer of Shipping Services' (2009) *Rev dr unif* 869, 869

⁶ United Nations Commission on International Trade Law, Status: The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, <http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html> accessed 5 April 2014

⁷ The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Aug. 25, 1924, 120 LNTS 187, 51 Stat. 233, Chapter 3

⁸ The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Aug. 25, 1924, 120 LNTS 187, 51 Stat. 233, Chapter 7

⁹ The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Aug. 25, 1924, 120 LNTS 187, 51 Stat. 233, Chapter 6, Article 26

¹⁰ The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Aug. 25, 1924, 120 LNTS 187, 51 Stat. 233, Chapter 4, Chapter 5

the reversal of the *Vallescura* rule, which deals with the carriers burden of proof in certain circumstances and the introduction of volume contracts. It shall then conclude that the Rotterdam Rules are an improvement upon the Hague-Visby Rules, as they successfully modernise and unify the law in relation to carriage of goods by sea, whilst also striking the correct balance between the shipper and carrier and as such it would be beneficial for the convention to be ratified.

The Multimodal Transportation Regime

Under the Hague-Visby Rules it is clearly stated that the Rules are only applicable to “contracts of carriage covered by a bill of lading or any similar document of title [which relate to] carriage of goods by sea.”¹¹ This idea of a “contract of carriage” is defined under Article 1(e) as: “the period of time when the goods are loaded on to the time they are discharged from the ship.” The exact remit of this definition was discussed in the case of *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd*,¹² which dealt with the question of whether or not the loading element of the carriage was subject to the Hague-Visby Rules. The court held that it was, in light of the fact that it would be unusual for loading to not be included within the rules and that “only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick.”¹³

This interpretation of the definition of carriage of goods by sea, suggested that the courts were inclined to adapt the laws to changes in practical operation of carriage of goods by sea. Indeed, the nature of this definition was extended even further in the case of *Mayhew Foods v OCL*,¹⁴ which dealt with the application of the Hague-Visby Rules to the transshipment elements of a carriage contract, where the bill of lading is intended to cover the entire journey. The court held that the Rules would cover such a situation, as a result of the fact that they are still journeys “in relation to and in connection with the carriage of goods by sea.”¹⁵ Again, this decision indicates a significant level of flexibility on the part of the judiciary, which is sensible in light of the need to incorporate the growing use of other forms of transport within contracts of carriage. Such flexibility cannot however deal with the rapid changes towards a variety of methods of transport in international trade contracts,¹⁶ but only serves to minimise the negative affects inherent in the restrictive nature of the Hague-Visby Rules.

As a result of these developments in trade practice, efforts have been made to create a multimodal regime within carriage of goods by sea laws, most notably in the Rotterdam Rules, which if they came into force would partially amend the current tackle-to-tackle system, with the addition of a door-to-door transportation regime. The exact nature of the multimodal system is outlined under Article 1(1) of the Convention, which states that a contract of carriage “shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea

¹¹ See *supra* note 3, Article 1(b)

¹² [1954] 2 QB 402

¹³ *Ibid*, 419, per Devlin J

¹⁴ [1984] 1 Lloyd’s Rep 317

¹⁵ *Ibid*, 320

¹⁶ A Sulicu, ‘Aspects of Multimodal transport in the Rotterdam Rules’ (2012) 1(1) PBLJ 45, 46

carriage.” Such a “maritime multimodal convention”¹⁷ would allow contracts of carriage to completely avoid the uncertainties found within the current Hague-Visby Rules, in a globalised world where carriage by sea will often only be a small portion of an agreed transportation of goods.¹⁸ This aspect of the convention is however not ideal, as a result of the qualifications outlined under Article 26, which creates what has been termed a “limited network solution”,¹⁹ as it outlines that where damage or loss occurs before or after the sea carriage, other transport conventions will have precedence over the Rotterdam Rules.²⁰

The current transport conventions and their effect are subsequently outlined under Article 82 of the convention. These restrictions upon the multimodal system are problematic, as they do not provide the universal system of law intended. Tetley submits this makes the application of the convention unpredictable, since parties may not be able to tell when the convention will apply and when it will not.²¹ This unpredictability is worsened as a result of Article 26(b), which restricts the priority of other international conventions to only apply where the provision in question relates to liability; in other words, the Rotterdam Rules will always have priority in relation to non-liability issues. With this in mind however, the Rules are not affected by national transport laws, which do not have priority over the Rotterdam Rules under any circumstances.²²

Opinion is divided as to how difficult the application of this multimodal system will be, with some commentators viewing it as “unworkable,”²³ whilst others are more positive in their view that there is no better alternative.²⁴ With this in mind, it is submitted that the approach taken under the Rotterdam Rules is the best approach possible, in light of the need to both unify international transport laws, which is highlighted in the difficulties seen in case law under the Hague-Visby Rules, as outlined above, whilst also acknowledging the legal force of the unimodal systems already in place. The introduction of a multimodal system of international carriage of goods by sea law is a necessary aspect of modernisation in an aging system and whilst the implementation of the regime may not be entirely strong, it is a step in the right direction that should be embraced by the international community.

Obligations and Liabilities

The Creation of a Continuous Seaworthiness Obligation

¹⁷ Y Baatz, C Debattista, F Lorenzon, A Serdy, H Staniland, M Tsimplis, *The Rotterdam Rules: A Practical Annotation* (5th Edition, CRC Press 2009), 5-01

¹⁸ *Ibid.*

¹⁹ G. Ziel, ‘Multimodal Aspects of the Rotterdam Rules’ (2009) *Rev dr unif* 981, 982

²⁰ See *supra* note 5, Article 26

²¹ W. Tetley, ‘A Summary of General Criticisms of the UNCITRAL Convention (The Rotterdam Rules)’ (2008)

<https://www.mcgill.ca/maritimelaw/sites/mcgill.ca.maritimelaw/files/Summary_of_Criticism_of_UNCITRAL__No_1.pdf> accessed 10 April 2014, 2

²² J. Adamsson, ‘The Rotterdam Rules, A Transport Convention for the Future?’ (2011) <<http://lup.lub.lu.se/student-papers/record/2292311/file/2371531.pdf>> accessed 6th April 2014, 44

²³ See *supra* note 20, 984

²⁴ See *supra* note 17, 49

The other aspect of the Rotterdam Rules, which will be pivotal to its success, is the proposed changes to carrier's obligation, which under both the Hague-Visby Rules and the Rotterdam Rules encompasses a number of different provisions; the most notable of which is the obligation of seaworthiness. Under the Hague-Visby Rules, carrier liability for unseaworthiness can be found under Article 3, which outlines that a carrier is liable "before and at the beginning of the voyage to exercise due diligence"²⁵ in making the ship seaworthy, by maintaining the condition of the ship, the effectiveness of the crew and the ships equipment, along with the cargoworthiness of the ship.

In the case of *Maxine Footwear Co Ltd v Canadian Government Merchant Marine*,²⁶ Lord Somerville confirmed that the phrase "before and at the beginning" indicates that the Hague-Visby Rules only extend to "the period from at least the beginning of the loading until the vessel starts on her voyage."²⁷ As a result of this, the carrier will not be held liable under the Hague-Visby rules if any evidence of unseaworthiness arises during the course of the voyage. This was illustrated in the case of *Leesh River Tea Co v British India Steam Nav Co*,²⁸ in which the court held that since the cargo in question was damaged as a result of the removal of the storm valve cover plate at an intermediate port, it was not a case of unseaworthiness, as it did not occur at the beginning of the voyage. It is submitted that this causes a burden upon the shipper, who is left to rely upon a claim under the continuous obligation to "properly care for the cargo" under Article 3(2).

Whilst this may at first appear to be a suitable alternative for the shipper, it is important to note that this provision is subject to the exceptions under Article 4(2) which includes nautical fault²⁹ and perils of the sea;³⁰ both of which are likely to affect the seaworthiness of the ship. Adamsson³¹ however notes that this may not practically affect the shipper, if the International Safety Management (ISM) Code were to permit the shipper to bring an action under public law in relation to the continuous seaworthiness obligation covered under this international code.³² This is however not a protection afforded by the Hague-Visby Rules, and it is therefore submitted that the law as it stands under these Rules leaves the shipper in a vulnerable position in relation to loss or damage caused by unseaworthiness that arises after the commencement of the voyage.

On the other hand, the Rotterdam Rules offer a solution to this issue, by way of Article 14, which states that: "the carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence." This shift in the law would mean that the carrier would be liable for the effects of unseaworthiness throughout the

²⁵ See *supra* note 3, Article 3(1)

²⁶ [1959] AC 589

²⁷ *Ibid*, 603, per Lord Somerville

²⁸ [1966] 2 Lloyd's Rep 223

²⁹ See *supra* note 3, Article 4(2)(a)

³⁰ Article 4(2)(b), Hague-Visby Rules

³¹ See *supra* note 23

³² *Ibid*, p15

entire voyage, which Nikaki and Soyer³³ submit is a welcome change, as it recognises the development of new technological aids, which permit a greater level of control over the ship after the commencement of the voyage.³⁴ In relation to how this will affect the liability of the carrier under the Rotterdam Rules, should they come into effect, many commentators have expressed concern that this would impose significant additional liability upon carriers.³⁵ However Berlingieri³⁶ notes that this obligation would still be subject to an assessment of due diligence, which would be assessed “on the basis of the action that may reasonably be taken in the specific circumstances ... [for example] to repair the damage on board if that is feasible, to call at the nearest port.”³⁷

On this basis, it is submitted that the courts would be permitted a great deal of flexibility in assessing the carrier’s liability under this change in the law, such that the level of liability may not be unreasonable. As a result, it is submitted that this change in the law provided by the Rotterdam Rules is a positive one, as it will create a modernised system of law, whilst creating a fairer regime for shippers, but not impacting too significantly upon the liability of carriers.

The Removal of the Nautical Fault Exception

The Rotterdam Rules also seek to amend the list of exceptional circumstances that are used by the carrier to discharge the burden of proof in relation to loss, damage or delay. Under the Hague-Visby Rules, a list of 17 exceptions are laid out under Article 4(2), which include perils of the sea,³⁸ act of God³⁹ and riots and civil commotions.⁴⁰ The exception that has attracted the most controversy however is held under Article 4(2)(a) which states that a carrier shall not be responsible for loss resulting from: “Act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship.” Also known as the nautical fault exception, this concession permits a great deal of protection to the carrier, only allowing the cargo owner the option of bringing a claim under Article 3(2), which imposes a duty upon the carrier to take care of the cargo.

The distinction between damage caused by nautical fault and damage caused by failure to secure and take care of the cargo is exemplified in the case of *Gosse Millerd Ltd. v Canadian Government Merchant Marine Ltd* (hereafter *Gosse Millerd Ltd*),⁴¹ in which rain had damaged the cargo, after the hatch cover protecting the cargo was negligently replaced. The court held that where the loss is a result of “neglect to take reasonable care of the ship, or some part of it, as distinct from the cargo” then the carrier is able to rely upon the exception, but where it is a result of “negligent failure

³³ T Nikaki, B Soyer, ‘A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive AND Efficient, or Just Another One for the Shelves?’ (2012) 30 Berkley J Int’l L 303

³⁴ *Ibid*, 329

³⁵ See *supra* note 23, 55

³⁶ F Berlingieri, ‘An Analysis of Two Recent Commentaries of the Rotterdam Rules’ (2012) *Il diritto marittimo* 22

³⁷ *Ibid*, 90

³⁸ See *supra* note 3, Article 4(2)(c)

³⁹ Article 4(2)(d), Hague-Visby Rules

⁴⁰ Article 4(2)(k), Hague-Visby Rules

⁴¹ (1928) 32 LILR 91

to use the apparatus of the ship for the protection of the cargo”, the carrier will be held liable under Article 3(2).⁴² Whilst this may appear to be a simple distinction, the application of this test has led to unusual results in subsequent case law, for example in the case of *Kalamazoo Paper Co v CPR Co*,⁴³ in which the Supreme Court of Canada held that the carrier could rely upon the exception, since the damage had occurred due to the vessel needing to beach, as a result of the crew failing to adequately use the pumping equipment.

From an objective perspective, it is difficult to see why this case should have been treated any differently from *Gosse Millerd Ltd*, which also involved a failure of the crew. This legal abnormality can however be explained by the fact that the Hague Rules were drafted in 1924, at a time when navigational and operational systems were not as developed as they are now. With this in mind, it is perhaps justifiable that such protections were previously afforded to carriers, despite the unusual judgments that resulted⁴⁴; however it is submitted that allowing this provision to be present in modern international carriage of goods by sea laws is unnecessary.⁴⁵

On the basis of reform in this area, the nautical fault exception has been omitted from the exceptions held within the Rotterdam Rules,⁴⁶ though the decision was not without opposition during the discussions of the Working Group. Concerns were expressed that amending carrier’s liability to this extent could affect “insurance practice.”⁴⁷ Whilst this worry is perhaps warranted, it was dismissed on the basis that no such exception has existed in other forms of transport since 1955, in recognition of the developments in navigational technology and as such the removal of the exception would be necessary to effectively modernise carriage of goods by sea laws.⁴⁸ It is therefore submitted that the removal of the nautical fault exception is an important reform of carrier’s liability, though it is acknowledged that it may be unpopular with states that are reliant of the protection of carrier’s interests, which may in turn affect the question of whether or not the Rotterdam Rules are ratified.

The Amendments to the Fire Exception

Another exception which has seen changes made under the Rotterdam Rules is the fire exception, which is held under Article 4(2)(b) of the Hague-Visby Rules and which states that the carrier will not be liable where loss or damage has been caused by: “fire, unless caused by the actual fault or privity of the carrier.” In other words, pursuant to this provision, a carrier will only be liable where they are personally at fault, or vicariously liable by reason of the conduct of its employees. With this in mind, problems arise with this provision particularly with regards to public companies, who can act either in the capacity of the company, or through agents, whose acts

⁴² *Gosse Millerd Ltd. v Canadian Government Merchant Marine Ltd* (1928) 32 LILR 91, 200, per Greer LJ

⁴³ [1950] 2 DLR 369

⁴⁴ M Jansson, ‘The consequences of a deletion of the nautical fault’

<https://gupea.ub.gu.se/bitstream/2077/7337/1/Nautical_Fault_Madeleine_Jansson.pdf> accessed 15th April 2014, p20

⁴⁵ See *supra* note 23, 56

⁴⁶ See *supra* note 5, Article 17

⁴⁷ Report of Working Group III (Transport Law) on the work of its tenth session (A/CN.9/525), para 36 <<http://daccess-ods.un.org/access.nsf/Get?Open&JN=V0258544>> accessed 6th April 2014

⁴⁸ *Ibid*, para 35

either lead to personal liability for them, or liability for the company, depending upon whether or not the agents are deemed to be the “*directing mind*”⁴⁹ of the company. As a result, in the House of Lords case of *Louis Dreyfus & Co v Tempus Shipping Co*,⁵⁰ the carrier was held not to be liable, in light of the fact that the fire was not caused by the carrier’s personal negligence, as such, providing immunity from liability.

Given the significant risk that is posed by fire to ships and cargos, despite “vastly improved fire-fighting equipment,”⁵¹ it is unusual that carriers should not be held liable for fire caused by their employees. Indeed, it has been noted that given the difficulties in identifying individuals who are acting as the company and the problems with proving causation in such cases, the fire exception held under the Hague-Visby Rules does provide “significant protection for the carrier.”⁵² With this in mind, the exception is somewhat limited by the obligation of seaworthiness, as it does not apply where the fire is a result of a lack of due diligence in relation to the seaworthiness of the ship,⁵³ as a result of the fact that this obligation is overriding. Given however, that this obligation under the Hague-Visby Rules only applies to damage or loss caused “before and at the beginning”⁵⁴ of the voyage, this limitation upon the exception will only apply to fire which occurs during this time, as such somewhat negating its restrictive effect upon the application of the exception.

In reaction to the consequences of this exception as it operates under the Hague-Visby Rules, the Rotterdam Rules have amended the fire exception to state that a carrier is relieved of liability for “fire on the ship.”⁵⁵ Whilst this may not appear to be a significant change, the real change comes under Article 18, which extends the carriers liability to include, liability “for other persons,”⁵⁶ including “any performing parties”, “the master or crew of the ship”⁵⁷ and “employees of the carrier or a performing party.”⁵⁸ The consequence of these provisions would be that the carriers would be liable for not only the acts of individuals acting as the directing mind of the company, but also the acts of their employees, which under the Hague-Visby Rules would have not attracted liability for the carrier.

This will undoubtedly have an impact upon the carrier’s liability in the same way in which the removal of the nautical fault exception will, although the question will be whether or not states will feel this impairment of carrier immunity will be an acceptable compromise in order to benefit from necessary modernisation of the law and the additional benefits being afforded to carriers under the Rotterdam Rules, which will be discussed later in this paper. It has been stated by Adamsson⁵⁹ that

⁴⁹ *Bolton (Engineering) Co Ltd v Graham & Sons Ltd* [1957] 1 KB 699, 710, per Denning LJ

⁵⁰ [1931] AC 726

⁵¹ W Williams, ‘The American Maritime Law of Fire Damage to Cargo: An Auto-Da-Fe for a Few Heresies’ (1985) 26(4) *Wm & Mary L Rev* 569, 578

⁵² See *supra* note 18, 55

⁵³ *Maxine Footwear Co Ltd v Canadian Government Merchant Marine* [1959] AC 589

⁵⁴ See *supra* note 3, Article 3(1)

⁵⁵ See *supra* note 5, Article 17(3)(f)

⁵⁶ *Ibid*, Article 18

⁵⁷ *Ibid*, Article 18(b)

⁵⁸ *Ibid*, Article 18(c)

⁵⁹ See *supra* note 23

whilst both the nautical fault exception and the fire exception received similar treatment under the Hamburg Rules, which was not ratified, the Rotterdam Rules do provide the necessary balance of beneficial provisions for carriers, such that it is possible that the Rotterdam Rules may be able to avoid the same fate as the Hamburg Rules.⁶⁰

The Addition of Liability for Delay

Under the Rotterdam Rules, changes have also been made to the carrier's liability for delay. With this in mind, the current system under the Hague-Visby Rules does not specifically outline liability for loss resulting from delay,⁶¹ but rather it is dealt with under the more general obligation to handle the cargo with care.⁶² Zhao⁶³ notes that the reason behind this may have been that in practice, a delivery time will not be included in the bill of lading⁶⁴ and as such it was easier to include issues relating to delay within a more general provision. Such a flexible approach has however caused problems in relation to issues of pure economic loss,⁶⁵ an issue that the courts sought to remedy through the use of the *Hadley v Baxendale*⁶⁶ test, which states that damages should be assessed in relation to what was "reasonably ... in the contemplation of the parties, at the time they made the contract."⁶⁷

Upon concluding that this was not the clearest way to approach liability for delay, the Hamburg Rules attempted to rectify this by drafting a provision which stated that where loss results from delay, the carrier will be liable, unless they can discharge the burden of proof through one of the outlined exceptions.⁶⁸ Delay within the context of the Hamburg Rules includes non-delivery "within the time agreed, or within the time which it would be reasonable to require of a diligent carrier."⁶⁹ The Rotterdam Rules however omit the latter half of the definition,⁷⁰ as such potentially leaving the law without a method by which to deal with common situations where no delivery time is agreed.

It has been submitted that this will make no practical difference to the regime outlined by the Hamburg Rules, as the courts will simply imply a reasonable time element into the Rotterdam Rules.⁷¹ With this in mind however, this change in the law still imposes a more stringent form of carrier liability for delay than the Hague-Visby Rules and as such may impact upon the popularity of the new system. Though

⁶⁰ *Ibid*, 25

⁶¹ *Ibid*, 60

⁶² See *supra* note 3, Article 3(2)

⁶³ L Zhao, 'Liability Regime of the Carrier under the Rotterdam Rules' <

<http://www.hksoa.org/contents/attachments/Presentations/2013/IFSPA2013/Papers/M28.pdf>>
accessed 8th April 2014

⁶⁴ *Ibid*, 2

⁶⁵ J Wilson, *Carriage of Goods by Sea* (7th Edition, Pearson Education Limited, 2010), 220

⁶⁶ (1854) 156 ER 145

⁶⁷ *Ibid*, 152, per Baron Sir Edward Hall Alderson

⁶⁸ See *supra* note 4, Article 5(1)

⁶⁹ *Ibid*, Article 5(1)

⁷⁰ See *supra* note 5, Article 21

⁷¹ A Diamond, 'The next sea carriage Convention?' (2008) LMCLQ 135, 153

this may be the case, it is submitted that clarification of liability for delay is necessary, as it provides the shipper with better protection in relation to loss resulting from delay; though it is conceded that the Hamburg Rules provided a clearer provision.

The Changes to the Carrier's Ability to Limit Liability

Limitation of liability in international carriage of goods by sea is perhaps one of the most contentious issues when drafting a new convention. The purpose of limitation of liability is rooted in the need to provide a universal standard of liability for carriers, as such allowing for lower freight rates, due to a lower threshold of risk.⁷² In seeking to fulfil this aim, the Hague Rules and the subsequent Hague-Visby Rules deliver a limitation regime, which allows the limitation amount to be calculated on the basis of either each unit of cargo, or the "weight of the goods lost or damaged, whichever is the higher."⁷³ This system has been refined over the years, through the Hague-Visby amendments and through the courts, which have issued judgments on problems including the meaning of the term "package or unit,"⁷⁴ amongst others. As a result of these developments, the law on limitation was somewhat settled prior to the drafting of the Rotterdam Rules and as such the only notable change made by the new convention, is to alter the limitation amounts.⁷⁵

The Rotterdam Rules regulates the limitation of the carrier's liability under Article 59, which states that carrier's liability "is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods."⁷⁶ In the context of this convention, as with those before it, the unit of account is the Special Drawing Right (hereafter SDR) as dealt with by the International Monetary Fund (hereafter IMF).⁷⁷ The values as laid out by the Rotterdam Rules are 30 per cent higher than those under the Hague-Visby Rules, which are set at 666.67 SDRs per unit.⁷⁸ It has been noted that such a rise may lead to hesitancy from carrier states to ratify the convention,⁷⁹ however Lannan⁸⁰ argues that this is a rash assumption, in light of the fact that limitation amounts are decided on the basis of a number of different factors and as such this change is likely to reflect a reasonable level.⁸¹

During discussions of the Working Group, countries were able to put forward their thoughts on proposed changes to limitation amounts, with some submitting that the Hague-Visby limitation levels had been working well over many years and as such should be replicated in the Rotterdam Rules, whilst others opined that given the introduction of the multimodal element of the Rules, it would be better to leave

⁷² J Wilson, *Carriage of Goods by Sea* (7th Edition, Pearson Education Limited, 2010), 195

⁷³ Article 4(5), Hague-Visby Rules

⁷⁴ *The River Gurara* [1998] 1 Lloyd's Rep 225

⁷⁵ See *supra* note 6, 877

⁷⁶ See *supra* note 5, Article 59(1)

⁷⁷ *Ibid*, Article 59(3)

⁷⁸ See *supra* note 3, Article 4(5)(a)

⁷⁹ See *supra* note 23, 67

⁸⁰ K Lannan, 'Behind the Numbers: the Limitation on Carrier Liability in the Rotterdam Rules' (2009) Rev dr unif 901

⁸¹ *Ibid*, 909

limitation at a lower level.⁸² With this in mind, the higher rate was eventually concluded on the basis that the limitation amounts should reflect the increase in inflation, particularly in relation to more expensive cargo and that in light of the multimodal elements of the convention, the limitation amounts would also need to fall broadly in line with other transport conventions, which had higher levels of limitation.⁸³

It is submitted that on this basis, the increase in carrier liability as a result of the change to limitation amounts will probably not be detrimental to the success of the Rotterdam Rules, as it is clear that significant time was taken by the Working Group to ensure a balance between the interests of the carrier and the shipper were struck.⁸⁴

The Reversal of the *Vallescura* Rule

Another issue that has arisen over the years for carriers is the application of the *Vallescura* rule, which imposes an unbalanced level of burden of proof upon the carrier in situations where it is difficult to ascertain liability. This rule arose in 1934 the US Supreme Court case of *Schnell v The Vallescura*,⁸⁵ in which it was held that where it was not possible to ascertain the proportion of damage caused by two factors, the carrier would be liable for the entire damage.⁸⁶ This decision, known more commonly as the *Vallescura* rule, still applies under the current US Carriage of Goods by Sea Act,⁸⁷ and has been adopted under Article 5(7) of the Hamburg Rules and is applicable in various other countries including Australia, Canada and England.⁸⁸ This provision weighs heavily against the interests of the carrier, with the burden of proof being “near impossible to meet,”⁸⁹ in turn creating a situation where the carrier will often be left liable for the entire loss, regardless of fault.

In light of this obviously unbalanced approach, the Rotterdam Rules seek to amend this aspect of carriage of goods by sea law, through the provision under Article 17(6). This provision states that: “the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.” The provision allows for a more reasonable approach, by giving the decision to the court that will discern the allocation of liability, rather than imposing the burden of proof upon the carrier to demonstrate that they are not liable.⁹⁰

As such, this particular provision actually benefits the carrier by reducing their liability in certain circumstances. Yuzhou and Li⁹¹ note that it is likely the Working

⁸² *Ibid*, 911

⁸³ *Ibid*, 915

⁸⁴ See *supra* note 48

⁸⁵ 293 US 296 (1934)

⁸⁶ *Ibid*, 304

⁸⁷ M Hendrikse, N H Margetson, N J Margetson, *Aspects of Maritime Law: Claims Under Bills of Lading*, (Kluwer Law International 2008) 95

⁸⁸ See *supra* note 23, 57

⁸⁹ M Sturley, ‘Modernising and Reforming U.S. Maritime Law’ (2008-2009) 44 *Tex Int’l L J* 427, 447

⁹⁰ S Yuzhou, H Li, ‘The New Structure of the Basis of the Carrier’s Liability for the Carrier under the Rotterdam Rules’ (2009) *Rev dr unif* 931, 939

⁹¹ *Ibid*.

Group's decision in reversing this well-established rule was motivated by a need to create more balance between the interests of the carrier and the shipper,⁹² in light of the fact that the provisions outlined earlier in the paper predominantly benefit the shipper. It is submitted that this provision may assist in creating a more balanced regime, which should in theory provide an acceptable compromise for all interested parties; as such optimising the potential for ratification of the Rules.

The Introduction of Derogations Through Volume Contracts

In addition to the reversal of the *Vallescura* rule, the Rotterdam Rules also seek to permit the carrier to derogate from some of the provisions of the convention, as such providing them with more freedom and the benefits that come with that. Under the current regime of the Hague-Visby Rules, it is made clear that it is not possible for carriers to contract out of or lessen the liabilities outlined in the convention and that any clause which attempts to do so will be "null and void and of no effect."⁹³

This was illustrated in the case of *Svenska Traktor AB v Maritime Agencies*,⁹⁴ in which the High Court rendered void the second half of a clause which stated that: "a steamer has liberty to carry goods on deck and shipowners will not be responsible for any loss, damage or claim arising therefrom."⁹⁵ The reasoning behind this attitude was to both ensure that the carefully drafted liabilities under the Rules would not be derogated from, as such creating a uniform and certain system of international carriage of goods by sea law, whilst also maintaining protection for the shipper. This restrictive approach has however not been maintained in the Rotterdam Rules, as under Article 80 derogations are permitted through the use of what is termed a "volume contract". Where this specific type of contract of carriage is drafted,⁹⁶ the Rotterdam Rules permit the carrier and shipper to agree within the contract to derogate from certain provisions within the Rules, which would otherwise be mandatory.

The introduction of the volume contract exception is one of the most controversial and heavily debated aspects of the Rules, as unlike the previous provisions discussed in this paper, it will benefit the carrier and may leave small shippers vulnerable in light of their minimal bargaining power.⁹⁷ It has however been submitted by Aguirre⁹⁸ that significant protections have been put in place to not only minimise the use of the volume contract exception, but also to specifically protect shippers.⁹⁹ These protections include the requirement that the application of any derogation must be a consensual decision for both parties to the contract; a condition that is imposed by the provisions under Article 80(2). These provisions include the need to have a prominent statement in the contract that makes it clear that it derogates from

⁹² *Ibid*, 940

⁹³ See *supra* note 3, Article 3(8)

⁹⁴ [1953] 2 QB 295

⁹⁵ *Ibid*.

⁹⁶ See *supra* note 5, Article 1(2)

⁹⁷ S Hashmi, 'The Rotterdam Rules: A Blessing?' (2012) 10 LMLJ 227, 261

⁹⁸ See *supra* note 6

⁹⁹ *Ibid*, 875

the convention,¹⁰⁰ along with the requirement that the shipper should be given the opportunity to conclude a contract that does not derogate from the Rules.¹⁰¹

It is submitted that in theory these conditions provide substantial protections for small shippers, however practically they may not be able to prevent abuse of this new system. Adamsson¹⁰² notes that whilst Article 80(2)(c) does call for a non-derogating contract to be offered to shippers, this may not be particularly useful, as carriers are likely to offer a more commercially attractive contract under the one that derogates from obligations and liabilities in their favour.¹⁰³ This view is shared by Hashmi¹⁰⁴ who has expressed concerns that carriers may reduce prices in order to get shippers to agree to derogations, an option that may be increasingly open to them in the more competitive market that will be created by the introduction of the volume contract exception.¹⁰⁵

Whilst this may be true, it cannot be denied that the Rotterdam Rules have not sought to protect shippers as much as possible through the provisions under Article 80(2), with few other options being open to the drafters¹⁰⁶ and as such it is submitted that the concession of practical difficulties for small shippers are necessary to permit a system with improved freedom of contract. Indeed, allowing such derogation may be crucial to ensuring the ratification of the Rotterdam Rules, given that it appears that the United States are significantly invested in the introduction of the provision, on the basis that it will then reflect their own national laws.¹⁰⁷ In light of the fact that the US were pivotal in the eventual ratification of the Hague Rules,¹⁰⁸ including such a volume contract provision may also be essential to the success of the Rotterdam Rules.

Conclusion

The Rotterdam Rules are the result of an extremely ambitious attempt at creating a modern, unified, certain and balanced international carriage of goods by sea system of law, and whilst the aspects of the Rules focused on in this paper are but a few of the many provisions offered by the new convention, it is submitted that they will be the ones which will be pivotal to the successful ratification of the Rules. It is submitted that the introduction of the multimodal transportation regime has been shown to be a necessary step towards a unified transportation system, in light of the difficulties faced by the Hague-Rules in dealing with other modes of transport, which is a consequence of the growing use of varied transport methods in carriage of goods contracts.

With this in mind, it is conceded that the new system may be practically difficult to implement, as a result of the other unimodal transport conventions already in place;

¹⁰⁰ See *supra* note 5, Article 80(2)(a)

¹⁰¹ *Ibid*, Article 80(2)(c)

¹⁰² See *supra* note 23

¹⁰³ *Ibid*, 50

¹⁰⁴ See *supra* note 97

¹⁰⁵ *Ibid*, 264

¹⁰⁶ F Berlingieri, 'Freedom of Contract under the Rotterdam Rules' (2009) *Rev dr unif* 831, 840

¹⁰⁷ See *supra* note 23, 48

¹⁰⁸ *Ibid*, 12

however it is submitted that it is still a successful piece of drafting despite these problems, and the multimodal element of the convention would no doubt still be a significant positive factor influencing any ratification of the Rotterdam Rules.

The changes to carrier's liability under the Rotterdam Rules have been equally radical, with the extension of the seaworthiness obligation showing signs of creating a significant addition to the liability of carriers. It cannot however be denied that the modernisation of this obligation is necessary, when the technological developments, which allow for a greater level of control over the ship, are taken into account.¹⁰⁹

This paper has also outlined the effects of similar concessions that have been made in relation to carrier's liability, so as to amend the carrier's liability for delay, in addition to the changes to the fire exception and the removal of the nautical fault exception, which it has been accepted is no longer necessary in light of the developments in navigational technology.¹¹⁰ It is submitted that it is likely that the particular changes in relation to the exceptions which provide immunity for carriers will be the largest cause of concern for carrier states, as they remove significant protection from the previous system. It is not however felt that the changes in relation to the limitation amounts will be particularly problematic for carrier's liability or ratification, as the discussions of the Working Group highlight that the figure concluded upon was a result of a thoroughly considered balancing exercise.

With this in mind, it has been correctly asserted by a number of commentators¹¹¹ that the success of the Rules cannot be assessed in light of only one or two provisions, as where the carrier's liability is harmed in one area, it is benefited in another. As such, it is submitted that the reversal of the *Vallescura* rule and the introduction of increased freedom of contract, through the use of volume contracts, will be particularly influential upon those concerned with changes to the carrier's liability.

It is therefore submitted that it would be beneficial for the Rotterdam Rules to be ratified on this basis, given the balanced nature of the Rules in these two pivotal areas of international carriage of goods by sea law and indeed it is predicted that it is likely that the Rules will be ratified in the future. On this point however, only time will tell.

¹⁰⁹ See *supra* note 34, 329

¹¹⁰ See *supra* note 23, 56

¹¹¹ *Ibid.*

Abandoning *Keck* for a Market Access Approach? An Analysis of CJEU Free Movement Jurisprudence

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Free movement law is essential for the construction and continued development of the internal market. In recent years there has been much debate within the Court of Justice of the European Union (CJEU) and among academics as to the type of legal test that should be utilised to maintain the free movement of goods, persons, services and establishment in the European Union (EU). This debate has been most prevalent in relation to the free movement of goods and accordingly this contribution focuses on this area. This contribution analyses how CJEU case law has evolved to establish whether the law is about prohibiting discrimination and protectionism or ensuring market access and economic freedom. This contribution argues that relevant case law indicates that the CJEU has adopted a market access test in relation to the free movement of goods and accordingly that the law is premised on economic freedom. It is submitted that this test is desirable as it ensures the efficient construction and continuous development of the EU's internal market.

Introduction

Free Movement Law in the EU's Internal Market

“**T**he most fundamental question for free movement law remains whether the law is about discrimination and anti-protectionism, [...] or whether it is about economic freedom”.¹

This contribution analyses the relevant case law to determine the extent to which this question has been answered, which legal test is relevant, and whether the applicable test is desirable.

Article 26² of the Treaty of the Functioning of the European Union (TFEU) states that: “The internal market shall comprise of an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured”. Free

¹ Jukka Snell, ‘The Notion of Market Access: A Concept or a Slogan?’ (2010) 47 CMLRev. 437-470.

² Consolidated version of the Treaty of the Functioning of the European Union (TFEU) [2012] OJ C326/59.

movement law is therefore essential for the establishment and development of the EU's internal market.³ Importantly, free movement law has taken an “undeniable shift away from the discrimination model towards one built upon market access”.⁴ This first occurred in the law on the free movement of services in *Säger*,⁵ followed by establishment in *Gebhard*⁶ and workers in *Bosman*.⁷

However, there has been much debate as to whether this shift has occurred in relation to the free movement of goods. In differentiating between “product requirements” and “certain selling arrangements”, debate has ensued regarding the “limits of negative integration in the establishment and regulation of the EU's internal market”.⁸ This debate has led to the development of two opposing tests reflecting different views about the extent to which the EU should intervene to correct national regulatory autonomy in favour of the internal market. In *Keck*,⁹ the CJEU applied a comparative test in order to prevent discrimination, whereas in *Leclerc-Siplec*¹⁰ Advocate-General (AG) Jacobs suggested that an absolute test should be used to ensure economic freedom if there is a “substantial barrier to market access”.¹¹

Article 34 TFEU and How *Keck* Limited It

Article 34 TFEU¹² prohibits quantitative restrictions on imports and all measures having equivalent effect. As was stated in *Dassonville*,¹³ these measures include: “all trading rules... which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade” catching all trading rules “regardless of whether they were distinctly applicable measures, indistinctly applicable measures or non-discriminatory measures”.¹⁴ The courts were thus prepared to apply Article 34 even where both the application of the rules and the consequential burden was equally felt by all goods.¹⁵ This reasoning was applied in *Cassis de Dijon*¹⁶ in which it was

³ Consolidated version of the Treaty of the European Union (TEU) [2010] OJ C83/02, Article 3.

⁴ Vanessa Yeo, ‘Discrimination or market access? Re-evaluating the EU's organisation of its internal market’ [2008] CSLR 315, 316.

⁵ Case C-76/90 *Manfred Säger v Dennemeyer & Co Ltd* EU:C:1991:331; [1991] ECR I-4421.

⁶ Case C-55/94 *Reinhard Gebhard v Consiglo dell'Ordine degli Avvocati e Procuratori di Milano* EU:C:1995:411; [1995] ECR I-4165.

⁷ Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* EU:C:1995:463; [1995] ECR I-4921.

⁸ Vanessa Yeo, ‘Discrimination or market access? Re-evaluating the EU's organisation of its internal market’ [2008] CSLR 315, 315.

⁹ Case C-267-268/91 *Criminal Proceedings against Keck* EU:C:1993:905; [1993] ECR I-6097.

¹⁰ Case C-412/93 *Societe d'Importation Edouard Leclerc-Siplec v TF1 Publicite SA* EU:C:1994:393; [1995] ECR I-179.

¹¹ *Ibid* [44].

¹² Consolidated version of the Treaty of the Functioning of the European Union (TFEU) [2012] OJ C326/61.

¹³ Case C-8/74 *Procureur du Roi v Dassonville* EU:C:1974:82; [1974] ECR 836, [15].

¹⁴ Vanessa Yeo, ‘Discrimination or market access? Re-evaluating the EU's organisation of its internal market’ [2008] CSLR 315, 316.

¹⁵ Stephen Weatherill, *Cases and Materials on EU Law* (10th Edition, Oxford University Press 2012) 326.

decided that a 25% alcohol requirement was an indistinctly applicable measure affecting trade as a measure equivalent to a quantitative restriction. It was deemed that this state measure was not justifiable by reference to any public-interest objectives (referred to as mandatory requirements) or by reference to the derogations¹⁷ under Article 36.¹⁸ This case established that “product characteristics” were *prima facie* within the scope of Article 34.

However, the scope of the *Dassonville*¹⁹ formula was so wide that it caught measures concerning market circumstances which were neither discriminatory nor a form of protectionism.²⁰ The Sunday trading cases, such as *Torfaen*,²¹ made it clear that some limitations were required since companies, such as B&Q, were using EU trade law as a way of achieving corporate objectives. In effect, challenging any rules that limited their “commercial freedom”.²² Accordingly, in *Keck*,²³ the court sought to develop “some clear rule which could limit the scope of application of this provision”.²⁴ In the instant case, Keck and Mithouard had resold goods at a loss in violation of a French law forbidding such practices.²⁵ They submitted that the law restricted the sale of imports by depriving them of a method of sales promotion and that the law was therefore incompatible with Article 34.²⁶ The CJEU held that “certain selling arrangements” were outside the scope of Article 34 if they satisfied the *Keck* proviso.²⁷ This meant that a certain selling arrangement must affect imports and domestically produced products in the “same manner in law and fact”.²⁸

*Gourmet International*²⁹ and *Familiapress*³⁰ clarified and refined *Keck*.³¹ These decisions suggest that *Keck*³² must be considered to determine whether a selling arrangement exists and accordingly whether it falls within the scope of Article 34. For example, in *Familiapress*,³³ it was deemed that prize games were merely methods of sales promotion and were therefore selling arrangements that did not

¹⁶ Case C-120/78 *Rewe-Zentrale v Bundesmonopolverwaltung für Branntwein* EU:C:1979:42; [1979] ECR 649.

¹⁷ *Ibid* 661-665.

¹⁸ Consolidated version of the Treaty of the Functioning of the European Union (TFEU) [2012] OJ C326/61.

¹⁹ Case C-8/74 *Procureur du Roi v Dassonville* EU:C:1974:82; [1974] ECR 836.

²⁰ Vanessa Yeo, ‘Discrimination or market access? Re-evaluating the EU’s organisation of its internal market’ [2008] CSLR 315, 317.

²¹ Case C-145/88 *Torfaen BC v B&Q plc* EU:C:1989:593; [1989] ECR 3851.

²² Case C-267-268/91 *Criminal Proceedings against Keck* EU:C:1993:905; [1993] ECR I-6097, [14].

²³ *Ibid* [14].

²⁴ Wouter Wils, ‘The search for the rule in Article 30 EEC: much ado about nothing?’ [1993] E.L.Rev 475, 475.

²⁵ Case C-267-268/91 *Criminal Proceedings against Keck* EU:C:1993:905; [1993] ECR I-6097, [1].

²⁶ *Ibid* [5]. See also: Stephen Weatherill, *Cases and Materials on EU Law* (10th Edition, Oxford University Press 2012) 328.

²⁷ Case C-267-268/91 *Criminal Proceedings against Keck* EU:C:1993:905; [1993] ECR I-6097, [16].

²⁸ *Ibid* [16].

²⁹ Case C-405/98 *Konsumentombudsmannen v Gourmet International* EU:C:2001:135; [2001] ECR I-1795.

³⁰ Case C-368/95 *Familiapress* EU:C:1997:325; [1997] ECR I-3689.

³¹ Case C-267-268/91 *Criminal Proceedings against Keck* EU:C:1993:905; [1993] ECR I-6097.

³² *Ibid*.

³³ Case C-368/95 *Familiapress* EU:C:1997:325; [1997] ECR I-3689.

come within the ambit of Article 34.³⁴ Therefore, *Keck*³⁵ established that “certain selling arrangements” were *prima facie* legal unless they were shown to be discriminatory in law or fact.³⁶

Leaving *Keck* Behind? Doubting the Reasoning in *Keck* and the Construction of an Alternative Test

AG Jacobs emphasised that “all undertakings which engage in a legitimate economic activity in a Member State should have unfettered access to the whole Community market”.³⁷ He argued that the reasoning in *Keck*³⁸ was unsatisfactory as it did not address the “underlying principle”³⁹ of free movement law, which he deemed to be market access. He therefore argued that the appropriate test is whether there is a substantial restriction to market access, thereby introducing a *de minimis* test.⁴⁰ The AG suggested that it is possible that “certain selling arrangements” may hinder market access and therefore prevent the development of the internal market.⁴¹ The AG criticised the reasoning in *Keck*, stating: “If an obstacle to inter-State trade exists, it cannot cease to exist simply because an identical obstacle affects domestic trade”.⁴² Accordingly, the AG argued that selling arrangements which cause a “substantial hindrance” to market access should also come within the ambit of Article 34. However, as a *de minimis* test, this depends on how substantial the restriction is as insignificant measures may be allowed to stand.⁴³ This absolute test clearly reflects AG Jacobs’ view that free movement law is about economic freedom and not merely about the prohibition of discrimination.⁴⁴

Later on, AG Maduro also doubted the reasoning in *Keck*⁴⁵ and emphasised the need for the principles defining the scope of Article 34 to be re-clarified. In *Alfa Vita*⁴⁶ he stated: “Although *Keck* and *Mithouard* was intended to limit the number of actions and to restrain the excesses which resulted from the application of the principle of the free movement of goods, in the end it increases the number of questions about the precise scope of the principle”.⁴⁷ He argued that there was a need to clarify the reasoning in *Keck* in order to achieve the principal aims of the internal market and aid its functionality.

³⁴ Ibid 3719-3720.

³⁵ Case C-267-268/91 *Criminal Proceedings against Keck* EU:C:1993:905; [1993] ECR I-6097.

³⁶ Vanessa Yeo, ‘Discrimination or market access? Re-evaluating the EU’s organisation of its internal market’ [2008] CSLR 315, 317.

³⁷ Case C-412/93 *Leclerc-Siplec* EU:C:1994:393; [1995] ECR I-179, [41].

³⁸ Case C-267-268/91 *Criminal Proceedings against Keck* EU:C:1993:905; [1993] ECR I-6097.

³⁹ Case C-412/93 *Leclerc-Siplec* EU:C:1994:393; [1995] ECR I-179, [41].

⁴⁰ Ibid [42].

⁴¹ Stephen Weatherill, *Cases and Materials on EU Law* (10th Edition, Oxford University Press 2012) 332.

⁴² Case C-412/93 *Leclerc-Siplec* EU:C:1994:393; [1995] ECR I-179, [39].

⁴³ Jukka Snell, ‘The Notion of Market Access: A Concept or a Slogan?’ (2010) 47 CMLRev 437, 450.

⁴⁴ Gareth Davies, ‘Understanding Market Access: Exploring the economic rationality of different conceptions of free movement law’ (2010) 11 GLJ 671, 673.

⁴⁵ Case C-267-268/91 *Criminal Proceedings against Keck* EU:C:1993:905; [1993] ECR I-6097.

⁴⁶ Case C-158-159/04 *Alfa Vita Vassilopoulos* EU:C:2006:212; [2006] ECR I-8135.

⁴⁷ Ibid [34].

AG Bot adopted the “substantial hindrance to market access” test in *Commission v Italy*.⁴⁸ This case was about the restrictive impact of an Italian law on the sale of trailers. The Italian law prohibited the towing of trailers by mopeds, motorcycles, tricycles, and quadricycles, meaning that trailers could only be towed by cars.⁴⁹ This case questioned how far Treaty provisions on free movement could constrain national regulatory autonomy.⁵⁰ It was deemed that this was an indistinctly applicable measure that had an equivalent effect to a quantitative restriction.⁵¹ AG Bot rejected a suggestion to extend the *Keck* test and instead suggested that the market access test should be applied to all measures;⁵² thus, “rules that prevent, impede, or render more difficult access to the market for imported products would fall within the scope of Article 28 EC and would therefore need to be justified”.⁵³ The CJEU largely supported the AG’s opinion; redefining the concept of barriers to intra-Community trade by adopting the market access test.⁵⁴

The CJEU in *Mickelsson and Roos*⁵⁵ confirmed the reasoning in the above case by reaffirming the market access test. This case does not mention the case of *Keck*⁵⁶ which suggests that the *Keck* limitation on the scope of Article 34 may no longer be applicable. Spaventa supported this conclusion stating that: “those cases which relate to rules on marketing or use are not based on a repartition of regulatory competences approach but on a freedom to trade approach and, therefore, a purely potential intra-Community effect is sufficient to bring the situation within the scope of the Treaty”.⁵⁷ However, she did admit that this depends on interpretation: “a narrow interpretation of *Commission v Italy* which would confine the relevance of the market access test to those rules which are neither selling arrangements nor product requirements, and a broader interpretation would dispose altogether of the *Keck* distinction”.⁵⁸ A narrow interpretation was adopted by Wenneras as he argued that *Commission v Italy* is “nothing but an extension of the settled principle” and only impacts the test examining whether the residual rules fall within the scope of Article 34.⁵⁹

However in recent cases, the CJEU has adopted a broad approach to the market access test; possibly signalling the abandonment of *Keck*.⁶⁰ For example, in

⁴⁸ Case C-110/05 *Commission of the European Communities v Italy* EU:C:2009:66; [2009] ECR I-519.

⁴⁹ Catherine Barnard, ‘Case Comment: Trailing a new approach to free movement of goods’ [2009] CLJ 288, 288.

⁵⁰ *Ibid* 288.

⁵¹ Case C-110/05 *Commission of the European Communities v Italy* EU:C:2009:66; [2009] ECR I-519, [58].

⁵² *Ibid* [11].

⁵³ Eleanor Spaventa, ‘Leaving Keck behind? The free movement of goods after the rulings in the *Commission v Italy* and *Mickelsson and Roos*’ (2009) 34 E.L.Rev 914, 916.

⁵⁴ *Ibid* 917.

⁵⁵ Case C-142/05 *Mickelsson and Roos* EU:C:2009:336; [2009] ECR I-4273.

⁵⁶ Case C-267-268/91 *Criminal Proceedings against Keck* EU:C:1993:905; [1993] ECR I-6097.

⁵⁷ Eleanor Spaventa, ‘Leaving Keck behind? The free movement of goods after the rulings in the *Commission v Italy* and *Mickelsson and Roos*’ (2009) 34 E.L.Rev 914, 928.

⁵⁸ *Ibid* 921.

⁵⁹ Pal Wenneras, ‘Selling arrangements, keeping Keck’ [2010] E.L.Rev 387, 397.

⁶⁰ Ionnis Lianos, ‘In Memoriam Keck: The reformation of the EU law on the free movement of goods’ [2015] E.L.Rev 225, 235.

*Commission v Poland*⁶¹ and *Commission v Lithuania*,⁶² the CJEU did not seek to categorise the contested national measure as a product requirement, selling arrangement or restriction on use as envisaged by the Court in *Keck*.⁶³ Instead, the CJEU found that the contested measure was a measure equivalent to a quantitative restriction if its effect was to “hinder access to the market”.⁶⁴ A broad view of the market access test was also adopted in *Commission v Spain*.⁶⁵ In this case, the CJEU did not refer to *Keck*⁶⁶ and referred only to *Commission v Italy*.⁶⁷ The Court adopted a broad approach in finding any “obstacle to trade” to be a measure equivalent to a quantitative restriction; regardless of whether or not the object of the measure was to treat less favourably foreign goods compared with domestic products.⁶⁸ On these grounds, it could be argued that *Keck* jurisprudence has been abandoned or merely left behind.

Evaluating the Market Access Test: Should *Keck* be Abandoned?

As stated by AG Maduro: “it had been apparent that the rule in *Keck* and *Mithouard* is not easily transposed into the field of the other freedoms of movement”.⁶⁹ One advantage of the market access model is that it would lead to “convergence across the four freedoms”⁷⁰ through the application of one uniform rule. This would abolish the need for classification⁷¹ of national measures as distinctly, indistinctly or non-discriminatory measures.⁷² However, it has been argued that this test is more of an economic test than a legal one.⁷³ This may be a disadvantage, as the test will “be based on quantitative data that will be difficult for the litigants to produce or become a highly intuitive exercise lacking in predictability”.⁷⁴ Many have criticised this test as it is likely to result in a reoccurrence of the difficulties before *Keck* with companies exploiting EU law to their own ends.⁷⁵ It has also been argued that use of the market

⁶¹ Case C-639/11 *Commission v Poland* EU:C:2014:173.

⁶² Case C-61/12 *Commission v Lithuania* EU:C:2014:172.

⁶³ Ionnis Lianos, ‘In Memoriam Keck: The reformation of the EU law on the free movement of goods’ [2015] E.L.Rev 225, 236.

⁶⁴ Case C-629/11 *Commission v Poland* EU:C:2014:173, [52]; Case C-61/12 *Commission v Lithuania* EU:C:2014:172, [57].

⁶⁵ Case C-428/12 *Commission v Spain* EU:C:2014:218.

⁶⁶ Case C-267-268/91 *Criminal Proceedings against Keck* EU:C:1993:905; [1993] ECR I-6097.

⁶⁷ Case C-110/05 *Commission of the European Communities v Italy* EU:C:2009:66; [2009] ECR I-519.

⁶⁸ Ionnis Lianos, ‘In Memoriam Keck: The reformation of the EU law on the free movement of goods’ [2015] E.L.Rev 225, 237.

⁶⁹ Case C-158-159/04 *Alfa Vita Vassilopoulos* EU:C:2006:212; [2006] ECR I-8135, [33].

⁷⁰ K Mortelmans, ‘Towards a convergence of the application of the rules on free movement and competition’ [2001] CMLR 613, 613.

⁷¹ Vanessa Yeo, ‘Discrimination or market access? Re-evaluating the EU’s organisation of its internal market’ [2008] CSLR 315, 322.

⁷² Recently, C-204/12 *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt* EU:C:2014:2192, [61]-[115] has blurred the distinction between justifications for distinctly and indistinctly applicable measures. Importantly, the CJEU did not state the type of measure in question. See Armin Steinbach, ‘Renewable Energy and the Free Movement of Goods’ (2015) 27(1) *Journal of Environmental Law* 1, 15.

⁷³ Jukka Snell, ‘The Notion of Market Access: A Concept or a Slogan?’ (2010) 47 *CMLRev* 437, 457.

⁷⁴ *Ibid* 457.

⁷⁵ Pal Wenneras, ‘Selling arrangements, keeping Keck’ [2010] E.L.Rev 387, 387.

access test may give rise to constitutional issues “in relation to the balance between the demands of the internal market and the need to respect national regulatory autonomy”.⁷⁶ However, it has been argued that this degree of CJEU pro-activity is necessary to ensure that the internal market continues to develop as intended.

Snell argued that the “notion of market access simply conceals the need to choose between the competing paradigms of free movement law” deeming it an “unhelpful slogan”.⁷⁷ On this basis, Snell argued that there should be “one standard for situations concerned with goods” and one for all other areas of free movement law.⁷⁸ In contrast, Spaventa argued that the market access test acknowledges the “needs and aims of the internal market” and that it “signals the latest stage in a long and tortuous path from the common market to a competitive internal market”.⁷⁹ This is supported by Wilsher, who argued that “*Keck* discrimination” is based “upon judicial hunches or intuitions rather than clear criteria and objective evidence about conditions of competition in the internal market”.⁸⁰ Adoption of the “substantial hindrance to market access” test is therefore an essential step towards a competitive internal market.

Conclusion

As has been discussed above, analysis of the relevant case law suggests that the *Keck* distinction is no longer applicable and that the market access test is now the relevant test. This test ensures the efficient construction of the internal market by limiting, regulating and harmonising national regulatory autonomy. Importantly, this absolute test, as constructed by AG Jacobs, is essential for ensuring, not only the removal of barriers to trade but, economic freedom throughout the internal market. However, the continual application of this line of reasoning and the market access test may be affected by constitutional issues between the EU and Member States and is dependent on the continuation of a broad interpretation.

⁷⁶ Eleanor Spaventa, ‘Leaving *Keck* behind? The free movement of goods after the rulings in the *Commission v Italy* and *Micklesson and Roos*’ (2009) 34 E.L.Rev 914, 929.

⁷⁷ Jukka Snell, ‘The Notion of Market Access: A Concept or a Slogan?’ (2010) 47 CMLRev 437, 471.

⁷⁸ *Ibid* 472.

⁷⁹ Eleanor Spaventa, ‘Leaving *Keck* behind? The free movement of goods after the rulings in the *Commission v Italy* and *Micklesson and Roos*’ (2009) 34 E.L.Rev 914, 929.

⁸⁰ Daniel Wilsher, ‘Does *Keck* discrimination make any sense? An assessment of the non-discrimination principle within the European Single Market’ [2008] E.L.Rev 3, 3.

Rethinking the Market Access Approach

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In the attempt to deal with the problems arising from the scope and terminology introduced by the *Keck* “selling arrangement” exception, the CJEU introduced the ambiguous term “market access”. Since then, the CJEU has increasingly adopted the market access approach in place of the orthodox non-discriminatory approach when ruling on free movement cases. Unfortunately, the true nature of market access and its relationship with the non-discriminatory approach has never been discussed by the court. Following the ruling in *Commission v Italy (Italian Trailers)* and *Mickelsson and Roos*, several commentators have taken the view that the non-discriminatory approach has been displaced. This paper will provide an alternative view by arguing that a pure market access approach is untenable. It is suggested that to make sense of the co-existence of market access and non-discriminatory approach, it will be necessary to rethink the purpose of the notion market access.

Introduction

Although *Keck and Mithouard*¹ marks a major leap in the law on free movement, it is definitely not the end of the development.² Further refinements can be observed from the cases following *Keck*. In particular, the increasing judicial preference for a market access approach brought about much judicial and academic debate. This paper will examine whether the market access approach has displaced the non-discriminatory approach by considering the existing jurisprudence. It will be argued that while the courts have relied on market access to justify their decisions, a pure market access approach is untenable, as it will introduce more problems than it can resolve. This paper will start with a review of the case law on the interpretation of the *Keck* exception and its implication on the use of market access as a justification. Next, it will examine whether the existing case law can be construed as establishing a market access approach before concluding in the last section.

¹ Joined Cases C-267/91 and C-268/91 *Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.

² S Weatherill, *Cases & Materials on EU Law* (10th edn, OUP 2012) 329.

Market Access and *Keck* Exception

***Keck*: Affirming the Non-Discriminatory Approach**

As early as in *Dassonville*,³ the court adopted a broad definition of Measures Equivalent to Quantitative Restriction⁴ which looks at the effects rather than the discriminatory intent of a measure.⁵ As a result, many claimants sought to abuse the protection as a means of challenging national rules that limit their commercial freedom, even though those measures were non-discriminatory in law,⁶ and had minimal effect on trade.⁷

In *Keck*,⁸ the court reconsidered the case law and distinguished between two categories of rules based on the condition that is required to be satisfied, namely “product characteristic” and “selling arrangements”. It was held that “selling arrangements” do not fall within the ambit of Article 34 TFEU if it applies to all traders operating in the territory and is non-discriminatory in law and in fact.⁹ The court explained that such rules are excluded because they neither prevent access to market nor impede access of foreign goods more than domestic goods.¹⁰ While the court clearly used the term “market access”, it was merely to describe the consequence and not meant to be a condition for the test.

The decision in *Keck* is significant because it shows that there is a limit to the scope of Article 34 TFEU. This implies that Member States are free to regulate on matters concerning “selling arrangements” that are non-discriminatory because they do not affect the realisation of a common market.¹¹ In doing so, the court in *Keck* unequivocally affirmed its preference for a non-discriminatory approach towards Article 34 TFEU.

Rethinking or Reaffirming the *Keck* Exception?

Although the decision in *Keck* alleviated the problem relating to the abuse of Article 34 TFEU, the use of a market access justification led to further problems in respect of the scope of the *Keck* exception and non-discriminatory rules which hinders market access. Consequently, the CJEU had to rethink its position on *Keck* and market access.

In *Keck*, the court failed to define the concept of “selling arrangements”.¹² Hence, it remains open for defendants to argue that the exception under *Keck* should be applied to measures even if they do not strictly concern rules relating to “selling arrangements”. For instance, in the services case, *Alpine Investment*,¹³ and workers

³ Case 8/74 *Procureur du Roi v Dassonville* [1974] 2 C.M.L.R. 436.

⁴ *ibid*, para 5.

⁵ P Craig and G De Burca, *EU Law: Text Cases and Materials* (4th edn, OUP 2007), 669

⁶ *Keck* (n 1), para 14.

⁷ Case 145/88 *Torfaen Borough Council v B. & Q. Plc* [1990] 2 W.L.R. 1330, para 7.

⁸ *Keck* (n 1).

⁹ *ibid*, para 16.

¹⁰ J Snell, ‘The notion of market access: a concept or a slogan?’ (2010) 47 CMLRev 437, 447.

¹¹ S Weatherill, ‘After *Keck*: Some thoughts on how to clarify the clarification’ (1996) 33 CMLRev 885-887.

¹² Case C-110/05 *Commission of the European Communities v Italy* [2009] E.C.R. I-519, Opinion of AG Bot, para 67.

¹³ Case C-384/83 *Alpine Investments BV v Minister Van Financiën* [1995] ECR I-1141, para 36.

case, *Bosman*,¹⁴ the defendants sought to apply *Keck* by analogy, but the courts clearly rejected the possibility of *Keck* being applied to other fundamental freedoms. Nevertheless, the question remains whether the scope of the exception under *Keck* can be extended to rules that are not selling arrangements within the free movement of goods. AG Kokott in *Mickelsson* opined that rules such as “restriction on use” are more analogous to “selling arrangements” and hence should be exempted under *Keck*, if the proviso can be satisfied.¹⁵ The implication is that it will “widen” the exception under *Keck* by allowing any non-discriminatory measure to fall outside Article 34 TFEU. However, this proposal was not adopted by the courts in *Mickelsson* and *Italian Trailers*.¹⁶

In *Italian Trailers*, AG Bot agreed with the opinion of AG Maduro in *Alfa Vita*¹⁷ that it is not appropriate to extend the exception in *Keck* to rules concerning “restriction on use”.¹⁸ The court concurred with the opinion of AG Bot and examined the rule under the “traditional analytical pattern”¹⁹ laid down in *Cassis de Dijon*.²⁰ Accordingly, the courts have adopted a clear stance against the expansion of the “selling arrangements” exception in *Keck*.

As Spaventa correctly suggested, it is uncertain whether the decision in *Italian Trailers* signifies an abandonment of the *Keck* exception and substituted it with a market access test.²¹ However, she goes on further to argue that if *Keck* remains good law after the adoption of a market access test, it would be difficult to explain why certain measures, like “selling arrangements”, which clearly have an impact on the market will only be caught if it is discriminatory, while other measures which might have relatively less effect on the market will be caught by the market access test.²²

Indeed, the adoption of a market access approach cannot fit well unless the *Keck* exception is impliedly repealed. However, the converse may also be true; *Keck* survived *Italian Trailers* and market access did not replace the non-discriminatory approach. This is the view put forth by Wenneras and Boe Moen who interpreted the decision in *Italian Trailers* as affirming the reasoning in *Keck* and more generally, the non-discriminatory approach.²³ According to them, like *Keck*, the use of the term “market access” in *Italian Trailers* was not meant to replace the non-discriminatory test.²⁴ Instead, it serves as a subsidiary test which is applicable only to non-discriminatory measures.²⁵ Hence, the decision in *Italian Trailers* not only did not

¹⁴ Case C-415/93 Union Royale Belge des Societes de Football Association (Asbl) and Others v Jean-Marc Bosman [1995] ECR I-4921, para 103.

¹⁵ Case C-142/05 *Åklagaren v Mickelsson and another* [2006] ECR I-4273, para 62.

¹⁶ *Commission v Italy* (n 13).

¹⁷ Joined Cases C-158/04 *Alfa Vita Vassilopoulos AE v Elliniko Dimosio and Another* and C-159/04 *Carrefour-Marinopoulos AE v Elliniko Dimosio and Another* [2006] ECR I-8135.

¹⁸ *Commission v Italy* (n 13), Opinion of AG Bot, paras 85 – 86.

¹⁹ *ibid*, para 87.

²⁰ Case 120/78 *Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwien* [1979] ECR 649.

²¹ E Spaventa, ‘Leaving *Keck* behind? The free movement of goods after the rulings in *Commission v Italy* and *Mickelsson and Roos*’ [2009] 34 ELRev 914, 921.

²² *ibid* 922.

²³ P Wenneras and K Boe Moen, ‘Selling arrangements, keeping *Keck*’ (2010) 35 ELRev 387, 393.

²⁴ *ibid*.

²⁵ *ibid* 393 – 396.

introduce a market access approach, it should be seen as a reaffirmation of the non-discrimination principle.²⁶

Non-Discrimination or Market Access Approach?

The Emergence of Market Access Approach

While the courts continue to emasculate the use of the *Keck* exception, there is a corresponding increase in the preference for a market access approach. One of the earliest applications of market access approach was in a services case, *Alpine Investment*.²⁷ After refusing to apply the *Keck* exemption by analogy, the court held that the prohibition on cold-calling “directly affect[s] access to the markets”²⁸ and hence could potentially hinder free movement. Similarly, market access reasoning was applied by the court in the workers case, *Bosman*.²⁹

Apart from the case law on workers and services, the expansion in the use of market access approach was also evident in cases relating to goods. In *Leclerc-Spilec*,³⁰ AG Jacobs criticised the non-discriminatory approach by arguing that “[i]f an obstacle to trade exists it cannot cease to exist simply because an identical obstacle affects domestic trade.”³¹ Similar support for a market access approach can be seen in AG Lenz’s opinion in *Commission v Greece*.³² However, in both cases the courts chose to retain the *Keck* orthodox approach.

Nonetheless, AG Jacobs’s view substantially influenced the courts’ decisions in subsequent cases.³³ In particular, the courts in *de Agostini*³⁴ and *Gourmet*³⁵ adopted AG Jacobs’s reasoning and focused its judgment on market access rather than discrimination. In both cases, the court placed more emphasis on whether the measure impeded market access “in fact” and held that rules characterised as “selling arrangements” would still infringe Article 34 TFEU, if the rule has a differential impact, in law or in fact, on market access of domestic and imported goods. In other words, if a selling measure has the same burden in law but different burden in fact, it would fall within the ambit of Article 34 TFEU. In *Italian Trailers*,³⁶ the issue before the court was whether a rule restricting the use of motorcycle trailers was contrary to Article 34 TFEU. The court applied a market access approach and held that a law which imposes a “restriction on use” would have “considerable influence on the behaviour of the consumer” and thus hindered market access.³⁷ The decision is

²⁶ *ibid* 399.

²⁷ *Alpine Investments* (n 14).

²⁸ *ibid*, para 38.

²⁹ *Bosman* (n 15).

³⁰ Case C-412/93 *Societe d’Importation Edouard Leclerc-Siplec v TF1 Publicite SA and Another* [1995] 3 C.M.L.R. 422, Opinion of AG Jacobs, paras 38 – 49.

³¹ *ibid*, paras 39.

³² Case 240/86 *Commission of the European Communities v Greece* [1989] 3 C.M.L.R. 578, 586, Opinion of AG Lenz.

³³ *Craig and De Burca* (n 6), 691.

³⁴ Case C-34-36/95 *Konsumentombudsmannen v De Agostini et al* [1997] ECR I-3843.

³⁵ Case C-405/98 *Konsumentombudsmannen v Gourmet International (GIP)* [2001] ECR I-1795.

³⁶ *Commission v Italy* (n 13).

³⁷ *ibid*, paras 55 – 57.

notable because the court affirmed its preference for a market access approach despite the ambiguity that comes along with it.³⁸

The market access approach not only received judicial support but was also welcomed by certain academics. For instance, Weatherill³⁹ agreed that the correct approach is to focus on whether there is “direct or substantial hindrance”⁴⁰ to market access and not merely legal and factual discrimination. Similarly, Barnard drew on existing jurisprudence from persons, services and goods to show that a market access approach provides a more “sophisticated framework”.⁴¹

Implications: A Lacuna?

The assessment of the free movement law, as AG Maduro rightly suggested, has to be seen in light of the “objectives of the internal market and European citizenship”.⁴² He argued that at the current level of integration, the Treaty provisions should not be interpreted by the courts as requiring unlimited negative integration.⁴³ Nonetheless, the courts appear to have surreptitiously shifted to a market access approach and hence emasculated the regulatory autonomy of Member States.⁴⁴ This may result in deregulation if there is no harmonisation relating to a particular type of regulation and the national measure is struck down for hindering market access.⁴⁵ While this can be avoided by the application of objective justification and proportionality, it would often require the courts to decide on measures concerning sensitive social policies⁴⁶ which they are reluctant to address.⁴⁷ It is difficult to see how the problems brought about by the market access approach can be resolved without further political integration.

An Alternative Explanation

Instead, a better explanation would be the one provided by AG Tizzano in *Caixa-Bank*.⁴⁸ He criticised the application of a pure market access approach, arguing that such a broad approach is open to abuse by economic operators.⁴⁹ Rather, he recommended returning to a non-discriminatory approach and to use market access as a subsidiary test. In other words, a measure that is non-discriminatory, in fact and in law, will not be considered a restriction unless it “directly affects market access.”⁵⁰ This, according to AG Tizzano, reconciles the objective of establishing a common

³⁸ C Barnard, *The Substantive Law of the EU* (3rd edn, OUP 2010), 106.

³⁹ Weatherill, (n 12) 900.

⁴⁰ *ibid*, 885.

⁴¹ C Barnard, ‘Fitting the Remaining Pieces into the Goods and Persons Jigsaw?’ (2001) 26 *ELRev* 34, 52.

⁴² *Alfa Vita* (n 18), Opinion of AG Maduro, paras 36–41.

⁴³ *ibid*; Horsley, ‘Anyone for Keck?’ (2009) 46 *CMLRev* 2001, 2008.

⁴⁴ C Barnard, ‘Restricting restrictions: Lessons for the EU from the US?’ (2009) 68 *CLJ* 575.

⁴⁵ Barnard, (n 39), 263.

⁴⁶ *ibid* 148.

⁴⁷ *ibid* 363; Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd. (S.P.U.C.) v Stephen Grogan and Others* [1991] 3 *C.M.L.R.* 849.

⁴⁸ Case C-442/02 *Caixa-Bank France v Ministere de L’Economie, des Finances v De L’Industrie (Banque Fédérale des Banques Populaires and Others)* [2005] 1 *C.M.L.R.* 2, Opinion of AG Tizzano.

⁴⁹ *ibid*, paras 62–63; Case 292/92 *Hunermund v Landesapothekerkammer Baden-Wurttemberg* [1993] *E.C.R.* I-6787, Opinion of AG Tesauero.

⁵⁰ *Caixa-Bank* (n 49), paras 65 – 66.

market with the regulatory autonomy of individual Member States.⁵¹ This view is reinforced by Wenneras and Boe Moen's suggestion that the use of the term "market access" in *Italian Trailers* was not meant to replace the non-discriminatory test but rather to serve as a subsidiary test to be used when dealing with non-discriminatory measures.⁵²

Arguably, what is unsatisfactory with the judgments is that they cause confusion because there is no definition of what the courts meant by market access and how it relates to discrimination. Snell explained the phenomenon by suggesting that the notion of market access has different usages. In cases like *de Agostini* and *Gourmet*, the courts use it to catch cases that are, in fact, restricting inter-state trade but would fall outside the ambit of Article 34 TFEU because they are non-discriminatory "in law".⁵³ According to Snell, the term "market access" serves merely as a label and by virtue of its ambiguity, allows the court to use it freely to approve or condemn measures arbitrarily.⁵⁴

Conclusion

In conclusion, the courts introduced the ambiguous term "market access" to deal with the problems arising from the scope and terminology introduced by the *Keck* "selling arrangements" exception. The courts, by increasingly adopting market access justification and limiting the scope of *Keck*, may be viewed as subtly displacing the non-discriminatory approach for a market access approach.

This suggests that the courts are introducing further market integration, which is excessive in light of the current objectives of the common market. Unfortunately, the courts neither explain the rationale for the apparent shift in their views nor the justification for the use of a market access test. While the reasoning by the courts remains obscure, academics have proposed an alternative approach to interpret the recent decisions as an affirmation of the non-discriminatory approach and that market access remains a mere label which is perhaps of utility to the court by virtue of its ambiguity. However, without further clarification, the recent development gave rise to more problems than it had resolved.

⁵¹ *ibid*, para 68.

⁵² Wenneras and Boe Moen (n 24).

⁵³ Snell (n 11), 468.

⁵⁴ *ibid* 469.

Originality in European Union Copyright Law

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This essay concerns the harmonisation of the originality requirement for copyright protection in the European Union (EU) and its impact on United Kingdom (UK) copyright law. The issue will be approached from the interpretation of EU directives by the Court of Justice of the EU (CJEU) in its case law, and the application in UK case law, as well as reference to relevant academic journals and textbooks. First, the *Infopaq*,³²⁰ and *Meltwater* decisions will be discussed³²¹; secondly, the approach of the English Court of Appeal to the CJEU understanding of originality, in *Meltwater*, will be reviewed; thirdly, the subsequent decision in *Temple Island Collections* is considered and how it crystallises the UK judiciary's understanding of originality, in light of the EU approach³²²; fourthly, the role of the Court of Justice (CJ) in copyright harmonisation will be discussed in terms of the relevant cases and academic commentary. This contribution holds the view that the decisions of the CJEU in *Infopaq*, and its progeny have affected the traditional UK standard of originality.

Introduction

Originality and the *Infopaq/Meltwater* Decisions

Originality is a crucial concept in copyright regimes, and “forms part of the underlying justification for the statutory system of copyright protection for authors”.³²³ Yet it is a concept that is inherently vague, and one commentator

³²⁰ Judgment in *Infopaq International A/S v Danske Dagblades Forening*, C-5/08, EU:C:2009:465.

³²¹ *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2010] EWHC 3099 (Ch); *Newspaper Licensing Agency Ltd and others v Meltwater Holding BV and others* [2011] EWCA Civ 890

³²² *Temple Island Collections v New English Teas Ltd* [2012] EWPC 1.

³²³ Commission, ‘Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights’ SEC (2004) 995, 13.

has noted that the problem is that it is sometimes everything and sometimes nothing, with us oscillating between the two platitudes.³²⁴ The different understandings of this requirement, in the European context, largely depend on whether a rights-based approach (in Continental Europe) or a utilitarian/incentives-based approach (in UK) is adopted.

In *Infopaq*, the issue was whether the activities of Infopaq International amounted to reproduction within the meaning of Article 2 of Directive 2001/29 (the InfoSoc Directive).³²⁵ Infopaq International wrote summaries of selected articles from Danish daily newspapers and magazines, where the selection was according to customer specification, utilising a data capture process to pick out the search word, together with the 5 words preceding and following it. In this reference for a preliminary ruling concerning the interpretation of Article 2 of the InfoSoc Directive, the CJ defined originality as the expression of the author's own intellectual creation.³²⁶ It arrived at this conclusion by taking a teleological approach to the interpretation of the recitals and provisions in the InfoSoc Directive. In doing so, it referred to the Berne Convention for the meaning of "work".³²⁷ Although until then, the understanding of originality had only been harmonised under Directives 91/250,³²⁸ 96/9,³²⁹ and 2006/116,³³⁰ for computer programs, databases and photographs respectively, the CJ inferred that, in establishing a harmonised legal framework for copyright, the InfoSoc Directive was rooted in the same principle, that a work was original if it is "the author's own intellectual creation", for all other copyright-protected works.³³¹

Following the *Infopaq* decision, the English judiciary was given the opportunity to apply the *Infopaq* decision under UK copyright law for the first time in *Meltwater*. The court had to decide if a licence was required from the publishers, in order for the

³²⁴ JV Smyth, "Originality in Enlightenment and beyond" in McGinnis R (ed), *Originality and intellectual property in the French and English enlightenment* (Routledge, 2009) 175 – 176.

³²⁵ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22 June 2001, 10 – 19.

³²⁶ *Infopaq* (n 1) para 37.

³²⁷ Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at PARIS on May 4, 1896, revised at BERLIN on November 13, 1908, completed at BERNE on March 20, 1914, revised at ROME on June 2, 1928, at BRUSSELS on June 26, 1948, at STOCKHOLM on July 14, 1967, and at PARIS on July 24, 1971, and amended on September 28, 1979.

³²⁸ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L122, 17 May 1991, 42 – 46, art 1(3).

³²⁹ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L77, 27 March 1996, 20 – 28, art 3(1).

³³⁰ Directive 2006/116/EC of the European Parliament and of The Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), OJ L372, 27 December 2006, 12 – 18, art 6.

³³¹ *Infopaq* (n 1) para 35 – 36.

company's clients to utilise the services to customers, involving hyperlinks to online news articles attached to the title of those articles, opening text of each article and an extract with the context of search terms. Proudman J held that it was required, that the test of quality had been restated but not altered by *Infopaq*, while accepting that the full implications of *Infopaq* had yet to be worked out.³³² Then, she stated that "skill and labour" was sufficient to produce an original copyright work, after acknowledging "[t]he effect of *Infopaq* is that even a very small part of the original may be protected by copyright if it demonstrates the stamp of individuality reflective of the creation of the author or authors of the article".³³³

The Approach of the English Court of Appeal to the CJEU Understanding of Originality

The Court of Appeal approved Proudman J's judgment, adding that "[t]he word 'original' does not connote novelty but that it originated with the author", and the CJ in *Infopaq* had referred to an "intellectual creation" in relation "to the question of origin not novelty or merit".³³⁴ In coming to its decision, the Court of Appeal had "stuck to its guns", in maintaining the traditional English understanding of originality, and misconstrued the test of originality propounded by the CJEU. The traditional UK standard of originality has been traditionally looser than the continental standard of "author's own intellectual creation", being defined as "what is worth copying is *prima facie* worth protecting",³³⁵ and sufficient "skill, judgment or labour",³³⁶ applied to a closed category of works.³³⁷ On the other hand, the CJ in *Infopaq* had pointed out that it is "only through the choice, sequence and combination of words that the author may express his creativity in an original manner",³³⁸ which clearly evinces creativity as the criterion for originality.

The Decision in *Temple Island Collections*

In the later decision in *Temple Island Collections*, the claimant took an iconic photograph of the London Routemaster red bus together with other landmarks, at a spot where other tourists do so as well, and spent eighty hours manipulating the photo to make the image of the bus stand out. The image had been licensed to some organisations, but the defendants had allegedly copied the claimant's photograph and used it on tins of tea. According to Birss J in the Patents County Court, it was common ground, based on *Infopaq* and *Painer*,³³⁹ that "copyright may subsist in a

³³² *Meltwater*, HC (n 2) [81].

³³³ *ibid* [83].

³³⁴ *Meltwater*, CA (n 2) [19] – [20].

³³⁵ *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, HC, 610 (Peterson J), as affirmed by the House of Lords in *Ladbroke (Football) Ltd. v William Hill (Football) Ltd* [1964] 1 WLR 273, HL, 279 (Lord Reid), 288 (Lord Hodson), 294 (Lord Pearce).

³³⁶ *Ladbroke* (n 16) 278 (Lord Reid).

³³⁷ Categories of works as defined in Copyright, Designs and Patents Act 1988, s 1.

³³⁸ *Infopaq* (n 1) para 45.

³³⁹ Judgment in *Painer v Standard Verags GmbH*, C-145/10, EU:C:2011:798.

photograph if it is the author's own 'intellectual creation'".³⁴⁰ He referred to the use of "intellectual creation" and noted that although it "differs from the way in which an English court would traditionally express itself in a copyright case", he saw "no difference in substance between the law as applied". This is similar language to Proudman J's dictum, and notable that UK judges considered the traditional test of "skill, judgment or labour" as equivalent to "author's own intellectual creation". Such notions seemed to indicate that UK judges did not consider the EU test of originality to have replaced the long-standing UK tests.³⁴¹ This leads one to question whether we are "perhaps seeing a UK resistance to the EU originality test or else problems in its translation into domestic laws".³⁴²

The Role of the Court of Justice in the Harmonisation of Originality Requirement

While UK courts have appeared to struggle with the implications of *Infopaq*, the CJEU has boosted copyright harmonisation in subsequent decisions, by affirming the *Infopaq* decision in *Bezpečnostní*,³⁴³ and further elaboration in subsequent case law.³⁴⁴ From the *Infopaq* and *Bezpečnostní* decisions, the CJEU has set an originality standard and established the subject matter of copyright as an open-ended concept covering all types of authored matter, through "intellectual creation", while its decisions in *Murphy*,³⁴⁵ *Football Dataco*,³⁴⁶ *Painer*,³⁴⁷ and *SAS*,³⁴⁸ have added "creative freedom", "free and creative choices" and "form of expression". These decisions bring into question the consistency of UK's closed subject matter categorisation with EU law.

Not only have UK courts found it difficult to understand the implications of *Infopaq*, but commentators have adopted diverging views. Some commentators have pointed out that *Infopaq*, through harmonisation of originality standards in the EU, may lead to the abandonment of traditional UK standards, and adoption of the continental standards, with a higher threshold to copyright protection.³⁴⁹ However, there are others who think that *Infopaq* may not have changed the UK approach,³⁵⁰ which

³⁴⁰ Temple Island Collections (n 3) [18].

³⁴¹ See n 15.

³⁴² T Aplin, J Davis, *Intellectual Property Law: Text, Cases and Material* (2nd edn, OUP 2013) 113.

³⁴³ Judgment in *Bezpečnostní softwarová asociace—Svaz softwarové ochrany v Ministerstvo kultury*, C-393/09, EU:C:2010:816, para 45.

³⁴⁴ E Rosati, 'Towards an EU-Wide Copyright? (Judicial) Pride and (Legislative) Prejudice' (2013) IPQ 47, 55.

³⁴⁵ Judgment in *Karen Murphy v Media Protection Services Ltd*, C-403/08, EU:C:2011:631, para 98.

³⁴⁶ Judgment in *Football Dataco v Yahoo! UK Ltd*, C-604/10, EU:C:2012:115, para 38.

³⁴⁷ *Painer* (n 20) para 94.

³⁴⁸ Judgment in *SAS Institute Inc v World Programming Ltd*, C-406/10, EU:C:2012:259, para 46.

³⁴⁹ E Rosati, 'Originality in a work, or a work of originality: the effects of the *Infopaq* decision', (2011) EIPR 746, 752; E Derclaye, '*Infopaq* International A/S v Danske Dagblades Forening (C-5/08): wonderful or worrisome? The impact of the ECJ ruling in *Infopaq* on UK copyright law', (2010) EIPR 247, 248 – 249.

³⁵⁰ S Peermohamed, 'European ruling on news reproduction', [2009] 194 Copyright World 12, 13.

appears to find support in *Meltwater*.³⁵¹ This demonstrates the boldness of the CJEU in *Infopaq* and its progeny, as well as the ambiguity of its dictum in those cases.

Conclusion

To say that UK copyright law has been unaffected by the CJEU's decisions in *Infopaq* and its progeny can be considered as tantamount to closing one's eyes to the obvious. However, those decisions may be at odds with the Berne Convention, which appears to imply any assessment of the originality requirement to follow that of the work being a production in the literary and artistic domain. Although the legitimacy in carrying out such "harmonization by stealth" is questionable,³⁵² it is undoubtedly the case that, until further harmonisation through reform of existing legislation, implementation of new regulation,³⁵³ or even, perhaps, the adoption of a European Copyright code (or title),³⁵⁴ any reference to the CJEU, is bound to elicit the same response. Thus, I disagree that *Infopaq* and its progeny have left traditional UK standard of originality unaffected. However, it is up to Member States to apply an activist CJEU's interpretation, and until the UK judiciary sees eye-to-eye with European standards, the impact may merely be in terms of phraseology.

³⁵¹ *Meltwater*, HC (n 2) [30], although it was stated in [40], that '[d]omestic legislation must be construed in conformity with, and so as to achieve the result intended by, EU Directives'.

³⁵² L Bently, 'Harmonisation by Stealth: Copyright and the ECJ' Fordham Conference 2012 (unpublished paper, 13 April 2012).

³⁵³ Consolidated Version of the Treaty on the Functioning of the European Union, OJ C326, 26 October 2012, 49 – 390, art 118.

³⁵⁴ The Wittem Group, 'European Copyright Code' (26 April 2010) <www.copyrightcode.eu> accessed 16 January 2015.