

# **International Trade and Business Law Review**

## **Volume XX, 2017**

*The International Trade and Business Law Review* publishes leading articles, comments and case notes as well as book reviews dealing with international trade and business law, arbitration law, foreign law and comparative law. It provides the legal and business communities with information, knowledge and understanding of recent developments in international trade, business and international commercial arbitration. The Review contributes in a scholarly way to the discussion of these developments while being informative and having practical relevance to business people and lawyers. From time to time, the Review also devotes a section to the Willem C Vis International Commercial Arbitration Moot and publishes the memoranda prepared by a team coached by Professor Gabriël Moens.

The Review is edited by Professor Gabriël Moens, who served as a foundation Professor of Law at Curtin University School of Law in Perth, Australia, during the editing of Volume XX. The Review is an internationally refereed journal and is supervised by an international board of editors consisting of leading international trade law practitioners and academics from the European Union, the United States, Asia and Australia. The Student Editors for Volume XX are Tracy Albin, Connor Gamble, Teresa Maines, Ben Ridgwell and Ray Muyunda.

For *International Trade and Business Law Review* submission and subscription information please see our website at:  [<business.curtin.edu.au/research/publications/journals/interational-trade-and-business-law-review/index.cfm>](http://business.curtin.edu.au/research/publications/journals/interational-trade-and-business-law-review/index.cfm).

# **International Trade and Business Law Review**

Volume XX, 2017

*Editor-in-Chief*

Professor Gabriël A Moens  
Professor of Law  
Curtin University, Australia

*Student Editors*

Tracy Albin  
Connor Gamble  
Teresa Maines  
Ben Ridgwell  
Ray Muyunda

*Editorial Consultant*

Claudia Carr

*International Editorial Advisory Board*

Professor Nicholas Aroney, The University of Queensland, Brisbane  
Emeritus Professor Eric Bergsten, Pace University, New York  
Professor Ronald A Brand, The University of Pittsburgh  
Professor Franchesco Cossu, Pegaso Telamatic University, Naples  
Professor Phillip Evans, Curtin University, Perth  
Professor Henry Deeb Gabriel, Elon University, North Carolina  
Professor Peter Gillies, Sydney  
Emeritus Professor Hans Van Houtte, Catholic University of Leuven,  
Belgium  
Professor Doug Jones, Clayton Utz, Sydney

Associate Professor Vernon Nase, Curtin University, Perth

Professor Luke Nottage, University of Sydney, Sydney

Professor Dale Pinto, Curtin University, Perth

Dr Martinus Parnawa Putranta, Universitas Atma Jaya Yogyakarta,  
Indonesia

Dr John Trone, Brisbane

Emeritus Professor Geoffrey de Q Walker, The University of  
Queensland, Brisbane

**International Trade and  
Business Law Review**  
Volume XX, 2017

**Gabriël A Moens**

**LexisNexis, Australia**

First published 2016  
by LexisNexis

© 2016 Gabriël A Moens and Authors

Typeset in Times New Roman by LexisNexis

Printed and bound by LexisNexis

All rights reserved. No part of this book may be reprinted or reproduced or utilized in any form or by any electronic, mechanical, or other means, now known or hereafter invented, including photocopying and recording, or in any information storage or retrieval system without permission in writing from the publishers.

ISSN: 1836-8573

ISBN: 978049344134

# Contents

## Articles

### **Consumer Dispute Settlement in the European Union and the United States**

Anastasia Konina

1

### **Himalaya v Privity: Protecting Third Parties to Shipping Contracts**

Bruno Zeller

32

### **Cost and Burden of Proof Under the CISG – A Discussion Amongst Experts**

Stefan Kröll, Larry DiMatteo, Ulrich Schroeter, André Janssen and Camilla

Baasch Andersen

177

**Making a Deal with the Devil: Are current  
Antitrust Sanctions Deterring Cartel  
Behaviour?**

Keith Violante

214

**Defining the Interface of Freedom and  
Discrimination: Exercising Religion,  
Democracy and Same-Sex Marriage**

Alex Deagon

241

**The Jury Trial in Western Australia:  
Comparative Observations**

Wouter L De Vos

289

# Comments

## **The Importance of Comity as a Backbone to Private International Law**

Tracy Albin

335

## **The Legality and Regulatory Challenges of Decentralised Crypto-Currency: A Western Perspective**

Connor Gamble

348

## **Climate Change Litigation: Urgenda v the State of Netherlands**

Ray Muyunda

364

# **Moot**

## **The Twenty-Third Annual Willem C. Vis International Commercial Arbitration Moot, 2015–2016**

Benjamin Teng, Madeline Rodgers,  
Matthew Paterson, Samuel Bullen and  
Sangeetha Badya

**378**

## **Willem C. Vis International Commercial Arbitration Moot**

Memorandum for the Respondent: The  
University of Queensland

**382**

# Book Reviews

**Christina Do, *Business, Law and Regulation: A Custom Publication for Curtin Law School*, LexisNexis Australia, 2015, ISBN 9780409342345, 402 pages**

Review by: Ben Ridgwell

464

**Djakhongir Saidov, *Conformity of Goods and Documents: The Vienna Sales Convention*, Hart Publishing, 2015, ISBN 9781849461559, 285 Pages**

Review by: Teresa Maines

473

# Articles

# CONSUMER DISPUTE SETTLEMENT IN THE EUROPEAN UNION AND THE UNITED STATES

ANASTASIA KONINA\*

## Abstract

*Consumer Protection Law — European Union — United States — Alternative Dispute Resolution — Online Dispute Resolution — Unfair Contract Terms — Fundamental Rights — Right to a Fair Trial — Access to Courts — Business to Consumer Contracts*

*This article addresses different approaches to the settlement of disputes between consumers and merchants that exist under the European and the United States ('US') law. It examines the different understanding of the freedom of contract in these legal systems. Based on this theoretical premise, it analyses legal foundations for the limits on arbitration clauses in consumer contracts under the European Union law. The article uses comparative law methodology in order to explain why these limits do not exist under the US law. Finally, it suggests a way to reconcile the two approaches through policing of unconscionable arbitration clauses.*

## I INTRODUCTION

Recent years have witnessed the increase of alternative dispute resolution mechanisms as well as the privatisation of enforcement institutions and regimes in several areas of European law, including consumer law. With the changes to the European Union consumer protection law brought by the *Regulation on Consumer Online Dispute Resolution* ('ODR Regulation')<sup>1</sup> and the *Directive on*

---

\* Bachelor of European and International Law (Hons) (Moscow State University of International Relations), LL.M. in International and Comparative Law (University of Pittsburgh School of Law), Law Clerk at Obermayer, Rebmann, Maxwell & Hippel LLP, Pittsburgh, Pennsylvania.

*Consumer Alternative Dispute Resolution* ('ADR Directive'),<sup>2</sup> both adopted in 2013, 'the European Union (EU) pioneers the creation of a comprehensive out-of-court dispute resolution system for B2C (business to consumer) conflicts'.<sup>3</sup>

With the emergence of specialised European enforcement mechanisms, national judicial enforcement systems of consumer protection are increasingly losing their importance. The supporters of traditional enforcement mechanisms raise a general question concerning the legitimacy of the new 'private' system for consumer law enforcement and a more specific question about compliance of new mechanisms with due process requirements, claiming that the speedy settlement of disputes between consumers and traders may be contrary to traditional understandings of the right of access to court.<sup>4</sup>

The privatisation and fragmentation of consumer rights enforcement is not merely a European trend, but an international one. For some time, the EU and the US have been 'reshaping their global policies, redefining the balance between private and public enforcement'.<sup>5</sup> The most representative of such 'redefinitions' is the UNCITRAL Working Group III project on Draft Procedural Rules for Online

---

<sup>1</sup> *Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR)* [2013] OJ L165/1.

<sup>2</sup> *Directive (EU) 11/2013 of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004; Directive 2009/22/EC (Directive on Consumer ADR)* [2013] OJ L165/63.

<sup>3</sup> Horst Eidenmuller and Martin Engel, 'Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe' (2014) 29 *Ohio State Journal on Dispute Resolution* 261, 261–2.

<sup>4</sup> *Ibid* 263.

<sup>5</sup> Fabrizio Cafaggi, 'The Great Transformation, Administrative and Judicial Enforcement in Consumer Protection: A Remedial Perspective' (2009) 21 *Loyola Consumer Law Review* 496, 497.

Dispute Resolution for Cross-border Electronic Commerce Transactions ('Draft Rules').<sup>6</sup>

The Draft Procedural Rules for regulating ODR providers and platforms, and coordination with the New York Convention for purposes of enforcement, along with three other instruments covering substantive rules to be applied, are a collective attempt to create a comprehensive online dispute resolution mechanism for B2B and B2C disputes arising out of cross-border, low-value transactions conducted by means of electronic communication. However, the proceedings of the Working Group III have been hindered due to the differences that exist between the EU and the US approaches to the settlement of disputes arising out of B2C transactions. The EU legislation has been interpreted and implemented to prohibit pre-dispute binding arbitration agreements in consumer contracts, while US law provides for no such limitation.

## II THE EU APPROACH TO DISPUTE RESOLUTION IN B2C TRANSACTIONS

Under European Union law, 'certain requirements of procedural due process are recognised... as fundamental rights'.<sup>7</sup> This implies that the member states have to respect these rights when they act within the scope of EU law.<sup>8</sup> So, when the member states are implementing the provisions of the ODR Regulation and the ADR Directive, they cannot derogate from certain due process guarantees. The primary sources of fundamental rights in the European Union are the

---

<sup>6</sup> UNCITRAL Working Group III, *Online Dispute Resolution for Cross-border Electronic Commerce Transactions: Draft Procedural Rules*, UN Doc. A/CN.9/WG.III/WP.133 (29 November 2014).

<sup>7</sup> Jürgen Bast, 'Of General Principles and Trojan Horses — Procedural Due Process in Immigration Proceedings under EU Law' (2010) 11 *German Law Journal* 1006, 1007.

<sup>8</sup> *Ibid* 1009.

European Convention on Human Rights ('Convention')<sup>9</sup> and the EU Charter of Fundamental Rights ('Charter').<sup>10</sup>

Article 6(1) of the Convention states that '[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...'.<sup>11</sup> In *Delcourt v Belgium*,<sup>12</sup> the ECHR held that:

[I]n a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 paragraph 1 would not correspond to the aim and the purpose of that provision.<sup>13</sup>

With an increase of complaints alleging violation of art 6 of the Convention, the ECHR began to transform its interpretation of the right of access to the court and the right to a fair trial. For instance, in *Deweert v Belgium*,<sup>14</sup> a butcher was prosecuted for selling pork at a high profit margin. Facing the choice between the payment of a penalty and the closure of his business for the time of the proceedings, he chose the former. Although the ECHR held that the butcher did not waive his right to a court hearing and was deprived of due process, it also noted that '[t]he "right to a court", which is a constituent element of the right to a fair trial, is... subject to implied limitations',<sup>15</sup> for

---

<sup>9</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

<sup>10</sup> *Charter of Fundamental Rights of the European Union*, adopted 30 March 2010 [2010] OJ (C 83/389). [cited as amended]

<sup>11</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 6(1).

<sup>12</sup> (1970) 1 Eur Court HR (ser A).

<sup>13</sup> *Ibid* [25] (Waldock P).

<sup>14</sup> (1980) 35 Eur Court HR (ser A).

<sup>15</sup> *Ibid* 21 [49] (H Mosler).

instance, in ‘domestic legal systems a waiver of this kind is frequently encountered...in the shape of arbitration clauses in contracts’.<sup>16</sup>

In the opinion of the Court, in order to comply with the ECHR such a waiver must have ‘undeniable advantages for the individual concerned as well as for the administration of justice’.<sup>17</sup> Having stated two requirements for the limitation of the right of access, the Court did not explicitly opine on the general legality of the arbitration clauses because, in its opinion, ‘it is not [its] function...to elaborate a general theory of such limitations’.<sup>18</sup>

Article 47 of the *EU Charter of Fundamental Rights* provides that:

[E]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.<sup>19</sup>

Unlike art 6(1) of the Convention, art 47 of the Charter does not distinguish between civil and criminal matters. In order to ensure that the right of access to court is guaranteed for consumers as parties with weaker bargaining power, EU legislators have challenged the validity of pre-dispute agreements to arbitrate in consumer contracts through a number of directives and regulations adopted by virtue of art 288 of the *Treaty on the Functioning of the European Union* (‘TFEU’) which states:

[T]o exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but

---

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> *Charter of Fundamental Rights of the European Union*, adopted 30 March 2010 [2010] OJ (C 83/389) art 47. [cited as amended]

shall leave to the national authorities the choice of form and methods.<sup>20</sup>

Therefore, ‘regulation is a general rule of conduct applicable to all persons falling within its scope, like a statute or law in the US’.<sup>21</sup> A directive is also a directly applicable legal instrument, although it is designed to give states more discretion as to ‘how to bring EU law norms into their domestic legal systems’.<sup>22</sup> For this reason ‘a directive is stated to be binding only as to result, but not as to “the choice of form and methods”’.<sup>23</sup> In light of this, art 288 of the TFEU implies that ‘directives, though binding on Member States, may not be directly applicable’.<sup>24</sup>

One of the directives that was adopted with the goal of limiting pre-dispute binding arbitration clauses in consumer contracts is the *Unfair Terms in Consumer Contracts Directive* (‘Unfair Contract Terms Directive’),<sup>25</sup> which contains ‘an indicative and non-exhaustive list of the terms which may be regarded as unfair’.<sup>26</sup> It mentions ‘excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions’.<sup>27</sup> Article 7(2) of the Directive provides:

Persons or organisations, having a legitimate interest under national law in protecting consumers...[may] take action

---

<sup>20</sup> *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force November 1993) art 288.

<sup>21</sup> George A Bermann, et al, *Cases and Materials on European Union Law* (West Publishers, 3<sup>rd</sup> ed, 2011) 76.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force November 1993) art 288.

<sup>25</sup> *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29.

<sup>26</sup> *Ibid* art 3(3).

<sup>27</sup> *Ibid* Annex q.

according to the national law concerned...so that [courts or administrative bodies] can apply appropriate and effective means to prevent the continued use of such terms.<sup>28</sup>

The practical effect of this provision is that most pre-dispute binding arbitration agreements in consumer transactions are declared null and void by the national legislation of EU member states implementing the directive.<sup>29</sup> At the same time, some pre-dispute arbitration agreements in consumer contracts are upheld by the national courts of the EU member states. For instance, the case of *Malcolm Marshall v Capital Holdings Limited* ('*Marshall*')<sup>30</sup> heard by the High Court of the Republic of Ireland, concerned an arbitration clause in a holiday contract which was entered between the consumer and the travelling agency.

The clause was worded as follows:

Subject to the provisions of sub-clause 12(b) of these conditions any dispute or difference of any kind whatsoever which arises or occurs between any of the parties hereto in relation to anything or matter arising under, out of or in connection with this contract shall be referred to arbitration under the arbitration rules of the Chartered Institute of Arbitrators –Irish Branch. Alternatively, claims which fall within the jurisdiction of the small claims court may be referred to that court.<sup>31</sup>

The provisions of the *Unfair Contract Terms Directive* were implemented in Ireland by *European Communities (Unfair Terms in*

---

<sup>28</sup> Ibid art 7(2).

<sup>29</sup> See, eg, *Mylcryst Builders Ltd v Buck* [2008] EWHC 2172 (TCC) where the High Court Queen's Bench Division concluded that Schedule 2, paragraph 1q of the Unfair Terms in Consumer Contracts Regulations of 1999 (which implements the *Unfair Consumer Contract Terms Directive* 93/13/EEC into UK domestic law) applied to a contract term requiring that all disputes were to be exclusively referred to arbitration. According to the Court, the said clause prevented the consumer from having access to the courts.

<sup>30</sup> *Malcolm Marshall v Capital Holdings Limited* [2006] IEHC 271.

<sup>31</sup> Ibid [6.1] (Murphy J).

*Consumer Contracts) Regulations of 1995*.<sup>32</sup> Schedule 3 to the Regulations borrowed the wording from the Annex to the Unfair Terms in Consumer Contracts Directive, thereby treating the pre-dispute arbitration agreements in consumer contracts as unfair terms. Nevertheless, the Court in *Marshall* upheld the arbitration agreement between the parties because it did not exclude other types of litigation (it allowed for the jurisdiction of small claims court) and was covered by legal provisions. In particular, the Court noted that '[t]he arbitrator has no power to disregard the law. While he or she has a wide measure of discretion to decide how a dispute is to be resolved, such decision must be according to the law'.<sup>33</sup> The Court further observed that 'there is no evidence that the arbitrator disregarded the law nor, indeed, did not follow proper procedure'.<sup>34</sup>

The wording of the Unfair Terms Directive that declares 'arbitration not covered by legal provisions'<sup>35</sup> to be an unfair term has been interpreted differently. For instance, Professor G.H. Treitel suggested that this provision applies to an arbitration clause that excludes completely the power of the court to review the arbitrator's award.<sup>36</sup> Others interpret it 'as confining the validity of pre-dispute agreements to public arbitration schemes which are regulated by ad hoc statutory regulations'.<sup>37</sup> Then, such schemes 'would be prima facie void only where they concerned arbitration which did not fall within the jurisdiction of legislation on arbitration'.<sup>38</sup> However:

---

<sup>32</sup> *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995* (Ireland) SI 27/1995.

<sup>33</sup> *Malcolm Marshall v Capital Holdings Limited* [2006] IEHC 271 [7.11] (Murphy J).

<sup>34</sup> *Ibid.*

<sup>35</sup> *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29 Annex q.

<sup>36</sup> G H Treitel, *The Law of Contract* (London Sweet and Maxwell, 9<sup>th</sup> ed. 1995) 251.

<sup>37</sup> Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union* (Routledge, 1<sup>st</sup> ed, 2010) 108.

<sup>38</sup> Christopher R Drahozal and Raymond J Friel, 'Consumer Arbitration in the European Union and the United States' (2002) 28 *North Carolina Journal of International Law and Commercial Regulation* 357, 366.

[Even] ‘an arbitration...covered by legal provision...may...fall foul of the Directive, but the onus rests with the consumer to demonstrate that it is unfair in that it imbalances the rights of the parties to the detriment of the consumer and contrary to the principles of good faith’.<sup>39</sup>

In other words, the Unfair Terms Directive does not necessarily ban all arbitration in the consumer area, but subsequent legislation and case law of EU and its member states demonstrate that such a ban has been implemented and is effectively being enforced.

The right of access to court for parties with weaker bargaining power in the EU is enforced by virtue of the rules of private international law. Section 4 of *Brussels I Recast Regulation* (‘Brussels I Recast Regulation’).<sup>40</sup> creates a special legal regime through jurisdiction clauses that are intended to ‘protect the weaker party, here the consumer, by rules of jurisdiction more favourable to his interest than provided for by the general rules’.<sup>41</sup> Such a legal regime has an effect of ‘prevent[ing] a consumer from being denied the benefit of his home court... when a dispute arises with a merchant’.<sup>42</sup>

In order for Section 4 of the *Brussels I Recast Regulation* to apply there must be a dispute between a consumer and a merchant that arises out of:

The contract [that] has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such

---

<sup>39</sup> Ibid.

<sup>40</sup> *Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I)* [2001] OJ L12/1, amended by *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)* [2012] OJ L351/1.

<sup>41</sup> Ulrich Magnus and Peter Mankowski, *Brussels I Regulation* (Sellier European Law Publishers, 2nd ed, 2012) 365.

<sup>42</sup> Ibid.

activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.<sup>43</sup>

Some courts have struggled to determine what constitutes ‘directing activities to a member state’ for the purposes of this article when it comes to cross-border internet advertising and soliciting. In their joint declaration, the Council and the Commission specified that the cross-border accessibility of the website is insufficient for the purposes of establishing the jurisdiction over the merchant in accordance with art 18 of the *Brussels I Recast Regulation*. It is essential that the merchant must solicit the contracts with consumers in that particular member state.<sup>44</sup> Among the factors that are dispositive when determining the directed soliciting are the language of the website, the currency designated for the payment of the purchase price and the delivery of the goods in the country of the consumer.<sup>45</sup>

At the same time, ‘[c]onsumers...are no longer required to complete contracts in their member states of domicile for their forum to apply’.<sup>46</sup> In practice this means that even if the consumer makes a purchase from abroad as long as they can prove their domicile in one of the member states where the merchant directly solicited the contract, they can sue the merchant in the court of their own or the

---

<sup>43</sup> *Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I)* [2001] OJ L12/1, amended by *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)* [2012] OJ L351/1 art 17(1).

<sup>44</sup> *Joint Declaration of Commission and Council concerning Articles 15 and 73, Annex II to the note of the General Secretariat of the Council of the EU for the Committee of Permanent Representatives in the Council of 14 December 2000 in the correct version of 20 December 2000-14139/00 COR2(en)-JUSTCIV 137.*

<sup>45</sup> Cortès, above n 37, 29.

<sup>46</sup> *Ibid.*

merchant's domicile.<sup>47</sup> Therefore, the consumer has a choice of the jurisdiction while the opposing party is denied such a choice.

Article 19 of the *Brussels I Recast Regulation* 'regulates the extent to which jurisdiction clauses are accepted under Section 4 of the Regulation'.<sup>48</sup> It contains an exhaustive list of instances when the choice of forum provisions of Section 4 can be derogated from by an agreement:

1. which is entered into after the dispute has arisen;
2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or
3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State...<sup>49</sup>

Commentators on the *Brussels I Regulation* note that art 19 operates as a supplement provision to the *Unfair Contract Terms Directive*, because art 67 of the Regulation states that '[t]his Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in instruments of the Union or in national

---

<sup>47</sup> *Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I)* [2001] OJ L12/1, amended by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) [2012] OJ L351/1 art 18(1).

<sup>48</sup> Magnus and Mankowski, above n 41, 386.

<sup>49</sup> *Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I)* [2001] OJ L12/1, amended by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) [2012] OJ L351/1 art 19.

legislation'.<sup>50</sup> The *Unfair Contract Terms Directive* applies to all consumer contracts, as well as to those covered by the *Brussels I Recast Regulation*. Therefore, a jurisdiction agreement which is permitted under art 19 of the *Brussels I Recast Regulation* can still be declared null and void under the provision of the *Unfair Contract Terms Directive*, as an unfair contract term.

The case of *Océano Grupo Editorial SA v Roció Murciano Quintero*<sup>51</sup> ('*Océano*') illustrates that the contract term can be declared unfair even in the absence of private international law limitations on the choice of forum. Here, the parties entered into contracts for the purchase of encyclopaedias for personal use. According to the choice of forum clauses in the contracts, the jurisdiction was conferred on the courts of Barcelona, a city in which none of the defendants were domiciled but where the plaintiffs had their principal place of business.<sup>52</sup> The purchasers of the encyclopaedias did not pay the sums due under the contract and the sellers brought actions in the Barcelona Court of First Instance (*Juzgado de Primera Instancia No 35 de Barcelona*) to obtain an order that the defendants should pay the sums due. 'As the case was purely national in nature, the *Brussels Convention* [predecessor of the *Brussels I Recast Regulations*] was inapplicable'.<sup>53</sup>

However, the national Court had doubts as to whether it had jurisdiction to determine on its own motion whether an unfair term is void under the *Unfair Contract Terms Directive* and asked the advice of the European Court of Justice. The ECJ ruled that:

Where a jurisdiction clause is included, without being individually negotiated...and where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller ...has his principal place of business, it must be regarded as unfair within the meaning of Article 3 of the Directive in so far as it causes, contrary to the requirement of good faith, a

---

<sup>50</sup> Ibid art 67.

<sup>51</sup> [2000] ECR I-4941.

<sup>52</sup> Ibid I-4971 [16] (GC Rodríguez Iglesias).

<sup>53</sup> Magnus and Mankowski, above n 41, 387.

significant imbalance in the parties' rights and obligations...to the detriment of the consumer.<sup>54</sup>

The Court further noted that '[the] Directive entails the national court being able to determine of its own motion whether a term of a contract before it is unfair',<sup>55</sup> thereby granting the national courts a certain level of discretion.

It was noted above that the *Brussels I Recast Regulation* acknowledges the validity of three types of jurisdictional clauses in consumer contracts; a subsequent jurisdiction clause 'which is entered into after the dispute has arisen', jurisdiction clauses widening the consumer's choice of forum and jurisdictional clauses that are valid under national law.<sup>56</sup> The third type is particularly interesting because it deals with cases where the consumer and the other party to the contract were domiciled or habitually resident in the same member state when the contract was entered into, and the consumer subsequently moved to another member state.<sup>57</sup> The practical effect of this provision is that it bars the consumer 'from instituting proceedings against the other party to the contract in the member state where the consumer has his new domicile'.<sup>58</sup> 'On the

---

<sup>54</sup> *Océano Grupo Editorial SA v Roció Murciano Quintero and Salvat Editores SA v José M Sanchez Alcón Prades, José Luis Copano Badillo, Mohammed Berroane and Emilio Viñas Feliú*, (Joined Cases C-204/98 to C-244/98) [2000] ECR I-4941, I-4973 [24] (GC Rodríguez Iglesias).

<sup>55</sup> *Ibid* I-4974, I-4975 [29] (GC Rodríguez Iglesias).

<sup>56</sup> *Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I)* [2001] OJ L12/1, amended by *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)* [2012] OJ L351/1 art 19.

<sup>57</sup> P Jenard, *Council Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* (Signed at Brussels, 27 September 1968) OJ 1979 C 59/1.

<sup>58</sup> Magnus and Mankowski, above n 41, 389–90.

other hand, the other party may institute proceedings in the member state where the consumer had his former domicile'.<sup>59</sup>

Another EU instrument, adopted to enforce the right of access to court for consumers, is the *European Small Claims Procedure Regulation* ('Small Claims Regulation'), which came into force in all member states except Denmark in January 2009.<sup>60</sup> This regulation was the first attempt to create a mechanism for the resolution of cross-border small claims litigation in civil and commercial matters. Although not specifically consumer oriented, this mechanism, with certain reservations, can be viewed as the predecessor of the ADR system that is now being implemented in the EU. In fact, prior to the adoption of the ODR Regulation and the ADR Directive it was suggested that 'the ESCP, in conjunction with ICT tools, has the potential to realise more efficient enforcement of consumers' rights'<sup>61</sup> as compared to the existing system.

In accordance with art 2 of the Small Claims Regulation:

[It] shall apply, in cross-border cases, to civil and commercial matters, whatever the nature of the court or tribunal, where the value of a claim does not exceed EUR 2 000 at the time when the claim form is received by the court or tribunal with jurisdiction, excluding all interest, expenses and disbursements.<sup>62</sup>

Although the *European Small Claims Procedure* should be relatively fast, simple and provide a comfortable way for consumers to protect their contractual rights which have been infringed by traders abroad, there are several issues that prevent consumers from using this procedure efficiently. The Commission's Report on *Small Claims*

---

<sup>59</sup> Ibid.

<sup>60</sup> *Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure* [2007] OJ L199/1.

<sup>61</sup> Cortès, above n 37, 98.

<sup>62</sup> *Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure* [2007] OJ L199/1 art 2.

*Procedure (Report)*<sup>63</sup> issued in November 2013, has revealed the following issues that hinder the successful application of the procedure:

1. lack of awareness among the judges,
2. lack of information or assistance for consumers,
3. the costs of the procedure, certain procedural issues,  
and
4. the enforcement of the judgments.<sup>64</sup>

According to the Report, as of the end of 2013, a substantial number of judges of the member states were not aware of the European *Small Claims Procedure*.<sup>65</sup> Consequently, consumers are not able to obtain necessary and accurate information about the procedure. Although art 4(5) of the *Small Claims Regulation* provides that ‘member states shall ensure that the claim form is available at all courts and tribunals at which the European Small Claims Procedure can be commenced’,<sup>66</sup> some courts and tribunals still do not provide consumers with specific forms, either on their premises, or on their websites.

Further, a suggestion exists that ‘the potential of the ESCP may be limited by its own restrictions’.<sup>67</sup> For instance, the limitation of ESCP to cross-border cases that are described as ‘one[s] in which at least one of the parties is domiciled or habitually resident in a member state other than the member state of the court or tribunal seized’<sup>68</sup> has been

---

<sup>63</sup> See *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Regulation (EC) No 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure* [2013] 795 final.

<sup>64</sup> *Ibid* 7–9.

<sup>65</sup> *Ibid* 8.

<sup>66</sup> *Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure* [2007] OJ L199/1 art 4(5).

<sup>67</sup> Cortes, above n 37, 105.

<sup>68</sup> *Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure* [2007] OJ L199/1 art 3(1).

discussed in the travaux préparatoires.<sup>69</sup> The European Parliament and the Council insisted on the application of the European *Small Claims Procedure* to domestic cases as well, but this idea was opposed by most of the member states based on art 65 of the EC Treaty (now art 81 of TFEU), which limits the participation of the Union in cross-border issues by stating that:

[T]he Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases.<sup>70</sup>

The new EU legislation on ADR and ODR is designed for the resolution of domestic and cross-border disputes and will allow consumers and merchants to solve their disputes without going to court. The objective of the ADR Directive is to ensure that consumers can turn to alternative dispute resolution entities for all kinds of contractual disputes that they have with merchants (excluding health and higher education). The ODR Regulation is aimed at resolving disputes that arise from domestic and cross-border online transactions through a Union-wide online platform. This time, in order to put an end to any deliberations of the member states regarding the application of these legislative acts to the domestic transactions, the Parliament and the Council have indicated that the legal basis for the initiatives is art 114 of the TFEU.<sup>71</sup> This provides for ‘measures for the approximation of the provisions laid down by law, regulation or administrative action in member states which have as their object the establishment and functioning of the internal market’.<sup>72</sup>

---

<sup>69</sup> United Kingdom House of Lords, *European Small Claims Procedure*, House of Lords Paper No 118, Session 2005–06 (2006) [52].

<sup>70</sup> *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993) art 81.

<sup>71</sup> See Recital (1) to the *ODR Regulation and the ADR Directive*.

<sup>72</sup> *Treaty on the Functioning of the European Union*, opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993) art 114.

While the objective of the ADR Directive is to give European consumers greater access to redress should something go wrong with their purchase of goods or services, it is worth noting that art 10 of the ADR Directive provides that:

Member states shall ensure that an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute had materialised and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.<sup>73</sup>

Therefore, the European Union confirms that pre-dispute binding arbitration in consumer transactions is inconsistent with the fundamental right of access to court as discussed previously.

### III THE US APPROACH TO DISPUTE RESOLUTION IN B2C TRANSACTIONS

Apart from several affirmative consumer protection laws that stipulate dispute settlement through credit card charge-back mechanisms, the US lacks any special legal provisions that would apply to the resolution of B2C disputes. There are no legal rules that would suggest that the consumer is entitled to the benefit of his home court in his disputes with merchants. There are also no legal prohibitions on the pre-dispute choice of forum agreements in B2C transactions. Moreover, the Supreme Court has repeatedly invoked the due process clause of the Fourteenth Amendment to ‘limit the authority of a state court to assert personal jurisdiction over a non-resident defendant [merchant]’.<sup>74</sup>

---

<sup>73</sup> *Directive (EU) 11/2013 of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR)* [2013] OJ L165/63 art 10.

<sup>74</sup> Rhonda Wasserman, *Procedural Due Process: A Reference Guide to the United States Constitution* (Greenwood Publishing Group, 1<sup>st</sup> ed, 2004) 210.

For instance, the minimum contacts test adopted in *International Shoe Co v State of Wash Office of Unemployment Compensation and Placement*<sup>75</sup> (*International Shoe*) requires the defendant to have sufficient minimum contacts with the State to make assertion of jurisdiction over them fair and reasonable. In its decision in *World Wide Volkswagen Corp v Woodson*<sup>76</sup> the Supreme Court developed a number of reasonableness factors that need to be met in addition to the minimum contacts test in order to assert personal jurisdiction over a defendant. In the absence of special rules regarding choice of forum in consumer transactions, it can be assumed that any claim filed by a consumer against a merchant is subject to the limitations imposed by the due process (constitutional) provisions.

As a general rule, ‘US law largely respects party autonomy for...choice of forum ...in consumer contracts’.<sup>77</sup> However, ‘this approach has been the subject of some criticism, in particular for results such as that in *Carnival Cruise Lines Inc. v Shute*’.<sup>78</sup> In this case, the Supreme Court upheld a small print forum selection clause on the back of a cruise ticket that required litigation of all disputes in Florida courts, even for consumers from the state of Washington who consented to the personal jurisdiction of the Florida courts by entering into the contract (i.e. by purchasing the ticket).

The US law does not have general access to court requirement, which means that consumer arbitration agreements, even if concluded prior to the dispute, are considered legal and binding. In fact:

[I]n the civil context, the Supreme Court of the United States has recognized a right of access to the courts only if two conditions are met: (1) the case affects a fundamental family relationship;

---

<sup>75</sup> *International Shoe Co v State of Wash Office of Unemployment Compensation and Placement* 326 US 310 (1945).

<sup>76</sup> 444 US 286 (1980).

<sup>77</sup> Ronald A Brand, ‘The Unfriendly Intrusion of Consumer Legislation into Freedom to Contract for Effective ODR’ in Maud Piers, Henri Storme, and Jinske Verhellen (eds), *Liber Amicorum Johan Erauw* (Intersentia, 2014) 365, 372.

<sup>78</sup> *Ibid*; 499 US 585 (1991).

and (2) the state judicial apparatus is the only mechanism available to obtain the relief sought.<sup>79</sup>

When it comes to consumer arbitration, however, certain concerns for the protection of consumers as parties with less bargaining power have resulted in the adoption by American Arbitration Association of a Due Process Protocol for Mediation and Arbitration of Consumer Disputes ('Protocol').<sup>80</sup> This Protocol does not have binding legal effect. Its purpose is to suggest best practices for procedural and substantive fairness in arbitrations involving consumers. Principle 11 of the Protocol that is entitled 'Agreements to Arbitrate' states the following:

Consumers should be given:

1. clear and adequate notice of the arbitration provision and its consequences;
2. reasonable access to information regarding the arbitration process, including basic distinctions between arbitration and court proceedings;
3. notice of the option to make use of applicable small claims court procedures as an alternative; and
4. a clear statement of the means by which the Consumer may exercise the option (if any) to submit disputes to arbitration or to court process.<sup>81</sup>

Although, the Protocol does not suggest that any prohibition should be placed on pre-dispute binding arbitration for consumers, it creates certain safeguards in order to ensure that consumers are fully aware of the forum choice that they make prior to engaging in a contract. At the same time, confirming the general principle of party autonomy that was stated above, the Drafting Committee of the 2000 Uniform

---

<sup>79</sup> Wasserman, above n 74, 113.

<sup>80</sup> American Arbitration Association, *Consumer Due Process Protocol Statement of Principles* (17 April 1998) American Arbitration Association, <[https://adr.org/aaa/ShowPDF?doc=ADRSTG\\_005014](https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014)>.

<sup>81</sup> Ibid principle 11.

Arbitration Act<sup>82</sup> has left the issue of adhesion contracts to the developing law.

In e-commerce cases, some courts apply a ‘sliding scale’ test, outlined in *Zippo Manufacturing CO v Zippo Dot Com Inc*<sup>83</sup> (‘*Zippo*’), to assert jurisdiction over a defendant merchant. The plaintiff, Zippo Manufacturing, a Pennsylvania corporation, brought a trademark infringement claim in the Western District Court of Pennsylvania against Zippo Dot Com, a Californian corporation. Zippo Dot Com operated a news website and registered the domain names ‘zippo.com’, ‘zippo.net’ and ‘zipponews.com’. The defendant moved for dismissal of the claim for lack of personal jurisdiction because its contacts with Pennsylvania occurred exclusively over the Internet. Zippo Dot Com advertised its service to Pennsylvanians through its website, which was accessible by everyone.<sup>84</sup> The subscribers contracted to receive services by visiting the website and filling out an application. Zippo Dot Com also entered into agreements with two internet access providers in the Western District of Pennsylvania.

In this case, the Federal District Court held that the availability of the jurisdiction is ‘directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet’.<sup>85</sup> The Court distinguished between active, passive and interactive web sites, saying, ‘where a defendant clearly does business over the Internet [through an active web site]...personal jurisdiction is proper’.<sup>86</sup> On the other hand, ‘[a] passive web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction’.<sup>87</sup> In the case of interactive web

---

<sup>82</sup> National Conference of Commissioners on Uniform State Laws, *Uniform Arbitration Act* (2000) Uniform Law Commission, <[http://www.uniformlaws.org/shared/docs/arbitration/arbitration\\_fina\\_1\\_00.pdf](http://www.uniformlaws.org/shared/docs/arbitration/arbitration_fina_1_00.pdf)>.

<sup>83</sup> 952 F.Supp.1119 (W.D. Pa.1997).

<sup>84</sup> 3,000 of approximately 140,000 of Dot Com’s worldwide subscribers were from Pennsylvania.

<sup>85</sup> Wasserman, above n 74, 240.

<sup>86</sup> *Zippo Manufacturing CO v Zippo Dot Com Inc*. 952 F.Supp.1119 (W.D. Pa.1997), 1124.

<sup>87</sup> *Ibid*.

sites ‘the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the web site’.<sup>88</sup>

US law provides consumers with protections for online purchases via private enforcement mechanisms, such as credit card chargebacks.<sup>89</sup> Credit card issuers must consider consumers’ claims for non-delivery, delivery of non-conforming goods and unauthorised or fraudulent charges. The law requires credit and debit card issuers to withhold the disputed payment and to investigate the consumer’s claim. If the consumer’s claim is upheld, the disputed charge must be reversed. The consumers are entitled to these protections and cannot waive them. The result of the procedure is non-binding and the consumer retains its rights to go to court.

The *Truth in Lending Act*<sup>90</sup> (‘TILA’) and the *Federal Reserve Board’s Regulation Z*<sup>91</sup> (‘Regulation Z’) govern consumer protections related to credit card usage. Regulation Z allows credit card holders to dispute and withhold payment for “billing errors” which include, among others:

[A] reflection on or with a periodic statement of an extension of credit for property or services not accepted by the consumer or the consumer’s designee, or not delivered to the consumer or the consumer’s designee as agreed.<sup>92</sup>

The failure of the consumer to resolve a dispute in respect of the goods with the merchant entitles her to ‘assert against the card issuer all claims (other than tort claims) and defences arising out of the transaction and relating to the failure to resolve the dispute’.<sup>93</sup> Thereby, Regulation Z allows a card issuer to withhold the payment upon the consumer’s request.

---

<sup>88</sup> Ibid.

<sup>89</sup> *Truth in Lending Act*, 15 USC §§ 1601 et seq. (2014) and *Federal Reserve Board’s Regulation Z* 12 CFR § 226 (2011).

<sup>90</sup> *Truth in Lending Act*, 15 USC §§ 1601 et seq. (2014).

<sup>91</sup> *Federal Reserve Board’s Regulation Z* 12 CFR § 226 (2011).

<sup>92</sup> Ibid § 226.13(a)(3).

<sup>93</sup> Ibid § 226.12(c)(1).

At the same time, the Regulation Z places certain limitation on the consumer's right to exercise this remedy by stating the following conditions:

1. the consumer has made a good faith attempt to resolve the dispute with the merchant,
2. the amount of credit extended exceeds \$50, and
3. the disputed transaction occurred in the same state as the cardholder's current designated address or within 100 miles from that address.<sup>94</sup>

It has been suggested that the settlement of disputes through charge-backs does not comply with procedural due process requirements.<sup>95</sup> For instance, a highly-influential list of procedural due process elements that was suggested by Friendly J includes the following elements:

1. unbiased tribunal;
2. notice of proposed action and grounds asserted for it;
3. opportunity to present reasons why should not occur;
4. right to call witnesses;
5. right to know opposing evidence;
6. right to have decision based exclusively on evidence presented;
7. right to counsel;
8. making of record;
9. availability of statement of reasons;
10. public attendance; and
11. judicial review.<sup>96</sup>

Obviously, not all of these elements are included in a charge-back dispute settlement process.<sup>97</sup> The relaxed due process requirements

---

<sup>94</sup> Ibid § 226.12(c)(3)(i).

<sup>95</sup> Neil M. Peretz, 'The Single Euro Payment Area: A New Opportunity for Consumer Alternative Dispute Resolution in the European Union' (2008) 16 *Michigan State Journal of International Law* 573, 651.

<sup>96</sup> Henry J Friendly, 'Some Kind of Hearing' (1975) 123 *University of Pennsylvania Law Review* 1267; Peretz, above n 95, 573.

<sup>97</sup> Peretz, above n 95, 651.

are justified for a number of reasons. Suggested by the UNICITRAL Model Rules drafters:

Business-to-consumer disputes, when they are simple and factually straightforward, may be easily solved through automated and informal systems...Due process in the context of online dispute resolution may entail proportionate fair hearing, reasons for decisions and transparency of the process.<sup>98</sup>

Another argument in favour of a more lenient approach is that ‘the incentives provided by competition...serve as an effective substitute for formal procedural due process structures’.<sup>99</sup> For instance:

Because card issuers are competing for cardholders and acquirers [financial institution that processes merchants’ payment card receipts] it is believed that both will try to better represent cardholders in the chargeback process in order to retain their business.<sup>100</sup>

#### IV A COMPARISON OF THE EU AND THE US APPROACH TO DISPUTE RESOLUTION IN CONSUMER TRANSACTIONS

Based on the analysis of the approaches towards dispute resolution in consumer transactions in the EU and the US the following conclusions can be made.

##### *A The goal of the legislative framework*

The main goal of the EU instruments that apply to B2C dispute settlement is to ascertain that a consumer, as a weaker party, retains the right of access to her home court in the event of the dispute with

---

<sup>98</sup> United Nations Commission on International Trade Law, *Possible Future Work on Online Dispute Resolution in Cross-border Electronic Commerce Transactions* A/CN.9/706 (23 April 2010).

<sup>99</sup> Andrew P Morriss and Jason Korosec, ‘Private Dispute Resolution in the Card Context: Structure, Reputation and Incentives’ (Case Legal Studies Research Paper No. 05–12, 2005) 90 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=735283](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=735283)>.

<sup>100</sup> Peretz, above n 95, 651–2.

the merchant and avails herself of the procedural due process. In the absence of the EU-wide private enforcement mechanisms, the court system is viewed as the most effective instrument for the enforcement of consumer rights. The US law in general, is defendant-oriented. The goal of protecting the defendant from unconstitutional assertion of personal jurisdiction is achieved through common law rules. These rules apply in any transaction, including B2C disputes, meaning that the legal framework does not grant any specific procedural rights to consumers.

### *B Applicable legislative framework*

In the European Union the resolution of B2C disputes is governed by the following laws:

- 1) The European Convention on Human Rights that guarantees the substantive right of access to court in criminal and civil cases and a number of procedural rights that follow from it. Although it was acknowledged by the European Court of Human Rights that in certain instances the right of access to court can be limited (in particular, when parties agree upon arbitration in their choice of forum clauses), the EU legislators interpreted this requirement restrictively for consumer-merchant transactions by adopting instruments that ensure that consumer is given the right to refer to court for the resolution of her disputes with the merchant.
- 2) The EU law:
  - a) Article 47 of the EU Charter of Fundamental Rights guarantees the right of an effective remedy before a tribunal;
  - b) The case law of the ECJ which suggests that the right to an effective remedy before a tribunal should be implemented by the EU institutions and member states in their respective legislative instruments;
  - c) Directives and regulations of the EU which place limitations on the arbitration agreements

in consumer transactions hereby jeopardizing the potential use of the framework created under ADR Directive and the ODR Regulation.

In the US the only statutes that are specifically aimed at resolution of consumer-merchant disputes are those that regulate charge-backs in online transactions. The absence of specific rules makes the US system of consumer dispute settlement more flexible and efficient compared to the EU system. It can be argued that efficiency and flexibility are achieved at the expense of procedural due process. Absence of rather complicated, costly and time consuming procedures might be advantageous when it comes to the resolution of disputes arising out of low-value high-volume online transactions.

#### V POLICING CONTRACT CLAUSES AS A WAY TO RECONCILE THE TWO APPROACHES

Common and civil law systems have developed their own ways for policing contract clauses. As was stated above, the US arbitration clauses in consumer contracts are not per se illegal, but the US courts use the common law doctrine of unconscionability to set aside those that are. The doctrine of unconscionability, derived from the actions in equity 'is now a defence in its own right'.<sup>101</sup> § 2-302 of the Uniform Commercial Code allows the court to set aside the unconscionable clauses and contracts or limit their application.<sup>102</sup> Comment 1 to § 2-302 provides further guidance as to the application of this legal rule by the courts:

The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract...The principle is one of the prevention of oppression and unfair surprise...and not of

---

<sup>101</sup> E Allan Farnsworth et. al., *Contracts: Cases and Materials* (Foundation Press, 8<sup>th</sup> ed, 2013) 522.

<sup>102</sup> *Uniform Commercial Code* (2002 version) § 2-302.

disturbance of allocation of risks because of superior bargaining power.<sup>103</sup>

The doctrine of unconscionability has received ‘differing degrees of welcome’<sup>104</sup> among US scholars. Professor Arthur Leff, for instance, made attempts to reconcile it with the freedom of contract.<sup>105</sup> He offered two types of unconscionability and referred to one of them as ‘bargaining naughtiness’<sup>106</sup> (procedural unconscionability), and to the other as ‘evils in the resulting contract’<sup>107</sup> (substantive unconscionability). According to Eisenberg:

The effect...of this distinction...was to domesticate unconscionability by accepting the concept insofar as it could be made harmonious with the bargain principle...while rejecting its wider implication that in appropriate cases the courts might review bargains for fairness of terms.<sup>108</sup>

Professor Richard Epstein, the defender of the common law principle of the freedom of contract, suggested that:

The reasons invoked for not enforcing the contract [shall] be of one of two sorts. Either there must be proof of some defect in the process of contract formation (be it duress, fraud or undue influence); or there must be, but only within narrow limits, some incompetence of the party against whom the agreement is to be enforced.<sup>109</sup>

In his opinion, only these circumstances justify the application of unconscionability.

---

<sup>103</sup> Ibid 1.

<sup>104</sup> Farnsworth, above n 101, 522.

<sup>105</sup> Ibid.

<sup>106</sup> Arthur Allen Leff, ‘Unconscionability and the Code—The Emperor’s New Clause’ (1967) 115 *University of Pennsylvania Law Review* 485, 487.

<sup>107</sup> Ibid.

<sup>108</sup> Melvin Aron Eisenberg, ‘The Bargain Principle and Its Limits’ (1982) 95 *Harvard Law Review* 741, 752.

<sup>109</sup> Richard Epstein, ‘Unconscionability: A Critical Reappraisal’ (1975) 18 *Journal of Law and Economics* 293, 315.

The development of common law led to the application of both procedural and substantive unconscionability for the purposes of setting aside the contractual provisions. For instance, Comment A to § 208 of the Restatement (Second) of Contracts suggests that, in determination of unconscionability:

[R]elevant factors include weaknesses in the contracting process...Policing against unconscionable contracts or terms has sometimes been accomplished “by...determinations that the clause is contrary to public policy or to the dominant purpose of the contract”.<sup>110</sup>

Comment c to this section states, ‘theoretically it is possible for a contract to be oppressive taken as a whole, even though there is no weakness in the bargaining process and no single term which is in itself unconscionable’.<sup>111</sup> This comment leads Professor Eisenberg to conclude, ‘unconscionability is a paradigmatic concept that can never be exhaustively described’.<sup>112</sup> At the same time, in the United States the freedom to contract and party autonomy play significant role in every contractual relationship and ‘the doctrine of unconscionability has evolved with this tradition in mind’.<sup>113</sup>

In civil law jurisdictions the judge-made doctrines that allow for policing of contractual terms are expectedly less frequent. ‘This is usually accomplished by requiring judges to use the dictates of civil codes as the boundary for discretion’.<sup>114</sup> In France, for instance, the courts operate several policing concepts. One of them is the doctrine of pre-contractual good faith; another is ‘the concept of *lésion* which deals with an oppressive imbalance between price and subject

---

<sup>110</sup> American Law Institute, *Restatement (Second) of Contracts* (1979) § 208 comment (a).

<sup>111</sup> *Ibid* comment (c).

<sup>112</sup> Eisenberg, above n 108, 754.

<sup>113</sup> Paul Bennett Marrow, ‘Policing Contracts for Unconscionability: Guidelines for International Arbitrators Subject to the Scrutiny of US Courts’ (2007) 73(4) *Arbitration* 382, 382.

<sup>114</sup> *Ibid* 390.

matter'.<sup>115</sup> Article 1118 of the French Civil Code provides that '[l]ésion vitiates agreements only in certain contracts and with regard to certain persons, as will be explained in the same section'.<sup>116</sup>

Under arts 1304 to 1314 of the French Civil Code, *lésion* permits a person under eighteen to rescind a contract if he has suffered or has been disadvantaged by it. Articles 1674 through 1685 of the French Civil Code govern the concept of *lésion* in real property contracts. Similar provisions can be found in art 1448 of the Italian Civil Code:

If there is a disproportion between the performance of one party and that of another, and such disproportion was the result of a state of need of one party, or which the other has availed himself for his advantage, the injured party can demand rescission of the contract. The action is not admissible if the lesion does not exceed one-half of the value that the performance made or promised by the damaged party had at the time of the contract...<sup>117</sup>

The German Civil Code, the *Bürgerliches Gesetzbuch* ('BGB'), contains general provisions pertaining to unconscionability in civil transactions. Article 138(2), which is included in the General Part of the BGB, reads as follows:

A legal transaction is void whereby a person exploiting the need, carelessness or inexperience of another, causes to be promised or granted to himself or to a third party in exchange for a performance, pecuniary advantages which exceed the value of the performance to such an extent that, under the circumstances, the pecuniary advantages are in obvious disproportion to the performance.<sup>118</sup>

In spite of the availability of these concepts in the national legislation of the EU, the judges of the national courts, unlike the US judges, are

---

<sup>115</sup> Joseph M. Perillo, 'Robert J Pothier's Influence on the Common Law of Contract' (2005) 11 *Texas Wesleyan Law Review* 267, 286.

<sup>116</sup> *Code Civil* [Civil Code] (France) art 1118.

<sup>117</sup> *Codice civile* [Civil Code] (Italy) art 1448.

<sup>118</sup> *Bürgerliches Gesetzbuch* [Civil Code] (Germany) § 138 (2).

limited in their discretion when it comes to B2C disputes. Since consumer protection is regulated on the level of the EU, the contract terms that are declared unfair or unenforceable in consumer transactions by the EU legislative instruments are implemented in the national laws of the member states. As a result, the judges are left with a list of contractual terms that they cannot uphold even if those terms could have been viewed as reasonable and fair in the context of a particular B2C transaction.

## VI CONCLUSION

Ebay UK has made an attempt to benefit from arbitration as one of the available options by including the following clause in its User Agreement:

We will consider reasonable requests to resolve the dispute through alternative dispute resolution procedures, such as mediation or arbitration, as alternatives to litigation. Any claim, dispute or matter arising under or in connection with this User Agreement shall be governed and construed in all respects by the laws of England and Wales. You and eBay both agree to submit to the non-exclusive jurisdiction of the English Courts.<sup>119</sup>

The wording of this clause does not help to resolve the main issue that stands in the way of the adoption of the UNCITRAL Model Rules because the arbitration option can be invoked at the request of the consumer only after the dispute has arisen.<sup>120</sup>

Meanwhile, the current EU legislative framework can be used in order to allow binding pre-dispute arbitration agreements in B2C contracts. It was mentioned above that the Annex to the *Unfair Contract Terms Directive* treats as unfair 'terms requiring the consumer to take disputes exclusively to arbitration not covered by

---

<sup>119</sup> eBay, *eBay User Agreement*, eBay, <<http://pages.ebay.co.uk/help/policies/user-agreement.html#disputes>>.

<sup>120</sup> Due to the confidential nature of the arbitration proceedings, it is impossible to determine if eBay's consumers take advantage of this option.

legal provision'.<sup>121</sup> This means that, as long as the arbitration clause in a contract provides that the resolution of the disputes shall be taken to an arbitration institution designated by law to hear the disputes, such an arbitration clause is arguably 'covered by the legal provision'.<sup>122</sup> Statutory arbitration can be established to deal at least with those disputes that arise out of low-value high-volume online B2C transactions.

For instance, the dispute resolution clause in a contract for the online purchase of goods that are sold by a EU merchant to a UK consumer through a web-site operating in UK can state: any dispute, controversy or claim which arises out of or relates to the non-delivery or untimely delivery of Goods, Goods not properly charged or debited, or Goods that were not paid for by the Buyer, shall be exclusively settled by [an arbitration entity designated by the UK in accordance with the ADR Directive to hear the dispute in accordance with its Rules] provided that the amount in controversy does not exceed [amount in £].<sup>123</sup> The decision of the ADR entity is to be final and binding on the parties. Any and all other disputes arising out of or in connection with an agreement decided under such a clause is to be settled by the English courts.

Such a clause limits the subject matter jurisdiction of the ADR entities to the most common types of disputes that arise out of high-volume, low-value online transactions. As suggested by the UNCITRAL Model Rules drafters, these disputes can be governed by due process standards that are less stringent than those normally required for state court civil procedure.<sup>124</sup> At the same time, this wording eliminates

---

<sup>121</sup> *Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts* [1993] OJ L 95/29 annex q.

<sup>122</sup> *Ibid.*

<sup>123</sup> Limits on a subject matter jurisdiction of the ADR entities will be determined in accordance with the legislation of the member states.

<sup>124</sup> United Nations Commission on International Trade Law, *Possible Future Work on Online Dispute Resolution in Cross-border Electronic Commerce Transactions* A/CN.9/706 (23 April 2010).

concerns that the parties will be deprived of their due process rights in case of any other dispute arising out of the contract.



# **HIMALAYA V PRIVILEGE: PROTECTING THIRD PARTIES TO SHIPPING CONTRACTS**

BRUNO ZELLER\*

## **Abstract**

*Himalaya Clauses — Privilege of Contract Rule — Development of the Clause — Shipping Contracts — Third-party Right of Recovery — England — Australia — South Africa — New Zealand*

*This article outlines the development of the Himalaya clause and the demise of the privilege rule in shipping law. The purpose is to simply state the law as it stands in common law, civil law and mixed legal systems. This article is a research tool, not only for academics, but also the practicing lawyers and the judiciary when deciding disputes in which the Himalaya clause (also known as the exemption clause) is in issue. To that end, all the seminal cases in the most important shipping countries are noted. In addition, this article also includes alternative options which have been devised to circumvent the privilege rule.*

## I A DESCRIPTION OF THE PROBLEM

### *A Outline*

Exemption clauses attempt to protect the carrier in a maritime adventure from liability. They also facilitate the difficulties associated with the privilege of contract doctrine in shipping contracts which traditionally failed to protect third parties that were unconnected to the underlying contract. In any marine venture, the risk of loss is never far from the minds of drafters of contractual terms. The issue is that the risk in the goods can transfer from the seller to the buyer once the goods are loaded; an issue that depends on the contractual terms – specifically incoterms. In most cases, it is the seller who contracts with the carrier to ship goods to the buyer. However, the seller is still in constructive possession of the goods and

with great probability, retains title to the goods until they are paid for by the buyer.

Simply put, the buyer accepts the risk of loss or damage caused by the carrier while the goods are in transit. The risk, amongst other things, is subject to contractual terms and the law of bailment. This article will use the term 'shipper' as referring to the person who enters into a contract of affreightment with a carrier. For the courts, it is simply a question of contractual construction. Historically, the contract was strictly applied in line with the privity rule. However, this solution did not always conform to commercial realities. Specifically, containerisation has created new challenges requiring different solutions. The common law, not surprisingly, adopted strategies to resolve the problems which the privity rule could not satisfactorily resolve; the main solutions are to be found in tort, third-party reliance on the bill of lading, bailment, the vicarious immunity approach, the himalaya clause, the direct approach and the *Contracts (Third Parties) Act 1999* (Cth).

From a carrier's point of view, significant changes occurred with the ratification of the Carriage of Goods by Sea Conventions, such as The Hague Rules and the subsequent amalgamation with the Visby Rules into the currently still applicable Hague-Visby Rules.<sup>1</sup> In brief, art IV notes that neither the carrier nor the shipper is liable for losses or damage arising out of making the ship seaworthy (except where art III applies). Article IV (2) and (3) further limit the responsibility for loss or damage in certain circumstances.<sup>2</sup> It is also important to note that:

The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause

---

\* Professor in Transnational Commercial Law at the University of Western Australia.

<sup>1</sup> *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*, opened for signature 23 February 1968, UNTS No 23643 (entered into force 21 December 1979) ('Hague-Visby Rules') art IV.

<sup>2</sup> Hague-Visby Rules art IV(2)–(3).

without the act, fault or neglect of the shipper, his agents or his servants.<sup>3</sup>

Furthermore, in instances where the carrier is liable, they are at least able to limit his liability pursuant to art IV(5)(a) of the Hague-Visby Rules.

The important question which occupied English courts in the twentieth century was how far the contractual clause could reach, as many maritime adventures usually involve many parties such as independent contractors who are not covered under the Hague-Visby Rules pursuant to art IV (2).<sup>4</sup> Questions in relation to wider contractual protection emerged as shipping become more complicated.<sup>5</sup> The question, therefore, is what and who is covered by the exemption clause which forms part of the contract of carriage? The second question is how do the courts interpret the clauses, that is, what are the interpretative tools and the legal principles which assist the courts in coming to their decisions?

In addition, the policy considerations driving the application of exclusions and limitations of liability in the shipping industry need to be understood. It is obvious that full exemption from all liability is a possible, and sometimes unfortunate, protection afforded to obvious and negligent wrongdoers, which does not favour the owner of the goods. The Hague-Visby Rules have introduced a limitation of liability<sup>6</sup> as noted above. Further, contractual terms and the Hague-Visby Rules can be used to limit the liability of the carrier. It is obvious that any maritime accident involving the liability of the carrier could give rise to a situation where there are substantial losses and insufficient assets to rectify the damage. However, the real issue arises when third parties which are not legally connected to the contract cause damage, in light of the privity rule.

---

<sup>3</sup> Ibid art IV(3).

<sup>4</sup> Ibid art IV(2).

<sup>5</sup> Theodora Nikaki, 'Himalaya Clauses and the Rotterdam Rules' (2011) 17(1) *Journal of International Maritime Law* 20, 20.

<sup>6</sup> Hague-Visby Rules art IV, r 5(a).

This article will trace the ‘warfare’ between traditionalist support of the privity rule on the one hand and the reformers who moulded the law to reflect modern commercial reality in shipping on the other, in particular, the drafting of exemption clauses in general. It will also trace the development of clauses which rely on both the agency theory and the trust theory of a third-party benefit by adding a circular indemnity provision.

### *B The Early Beginnings*

During the 19<sup>th</sup> century in England, contract clauses were subject to the privity rule as developed in *Tweddle v Atkinson*<sup>7</sup> (*‘Tweddle’*). In this case, in consideration of an intended marriage, a certain sum was to be given as a marriage portion. Wightman J agreed that previous case law supported the position that ‘a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration’.<sup>8</sup> However recent decisions do not appear to support this assumption and the rule is currently ‘that no stranger to the consideration can take advantage of a contract, although made for his benefit’.<sup>9</sup>

In 1915, the House of Lords strongly maintained the privity rule in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*<sup>10</sup> (*‘Dunlop’*). Viscount Haldane LC set out the law currently used in England as follows:

My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam.<sup>11</sup>

---

<sup>7</sup> (1861) 121 ER 762.

<sup>8</sup> Ibid 763 (Wightman J).

<sup>9</sup> Ibid 764 (Wightman J).

<sup>10</sup> [1915] AC 847.

<sup>11</sup> Ibid 853 (Viscount Haldane LC).

Lord Dunedin approached the case differently by first noting:

But speaking for myself, I should have no difficulty in the circumstances of this case in holding it proved that the agreement was truly made by Dew as agent for Dunlop, or in other words that Dunlop was the undisclosed principal, and as such can sue on the agreement. Nonetheless, in order to enforce it, he must show consideration, as above defined, moving from Dunlop to Selfridge.<sup>12</sup>

The question was what Dunlop had done to give consideration to Selfridge; the answer was nothing.<sup>13</sup> For these reasons, the Court dismissed the appeal. This rule stood uncontested until 1924, when the Court in *Elder Dempster & Co Ltd v Paterson Zochonis & Co Ltd* ('*Elder Dempster*')<sup>14</sup> developed what could be termed as the start of the protection of unconnected third parties. This development found its next logical step in *Adler v Dickson*,<sup>15</sup> where unconnected third parties were protected via a clause in a contract, now referred to as the Himalaya clause.

#### *C Elder Dempster*

In this case, a time charterer loaded palm oil at a West African port to be shipped to Hull in the steamship *Grelwen*. The ship also loaded palm kernels on top of the barrels. The kernels, being heavy, crushed the barrels and upon arrival in England the greater part of the palm oil was lost. The bill of lading protected the charterers from damage due to bad stowage. The shipper sued the charterer and the shipowner for damages for breach of contract or alternatively, for negligence or breach of duty.

Viscount Cave in the House of Lords posed the question whether the damage was due to unseaworthiness or bad stowage. If it was due to unseaworthiness, the charterers were not protected by the conditions

---

<sup>12</sup> Ibid 855 (Lord Dunedin).

<sup>13</sup> Ibid.

<sup>14</sup> [1924] AC 522.

<sup>15</sup> [1955] 1 QB 158.

in the bill of lading. The court of appeal found that the ship was Seaworthy.

Therefore, the next question was whether the shipowner is protected by the clause in the bill of lading? The court noted that 'there is nothing in the charter to bind the shipowners towards the respondents at all. Their contract with the plaintiffs is in the bill of lading, if anywhere'.<sup>16</sup> Viscount Cave argued that the shipowners are protected because:

It may be that the owners were not directly parties to the contract; but they took possession of the goods (as Scrutton LJ says) on behalf of and as the agents of the charterers, and so can claim the same protection as, their principals.<sup>17</sup>

Viscount Finlay agreed with Viscount Cave but added:

If the act complained of had been an independent tort unconnected with the performance of the contract evidenced by the bill of lading, the case would have been different. But when the act is done in the course of rendering the very services provided for in the bill of lading, the limitation on liability therein contained must attach whatever the form of the action and whether owner or charterer be sued.<sup>18</sup>

*Elder Dempster* certainly created discussions, and subsequent courts had some difficulties ascertaining the ratio within the case.

#### *D Limitation of Terms*

The claimant in most cases will be the party at the end of the supply chain which is either the buyer or the consignee, and the action will usually be based on a contract. Parallel recovery under tort and/or bailment is usually limited by the terms of the contract. The decision

---

<sup>16</sup> *Elder Dempster & Co Ltd v Paterson Zochonis & Co Ltd* [1924] AC 522, 552 (Lord Sumner).

<sup>17</sup> *Ibid* 534 (Viscount Cave).

<sup>18</sup> *Ibid* 548 (Viscount Finlay).

in *Pyrene Co Ltd v Scindia Navigation Co Ltd*<sup>19</sup> (*Pyrene v Scindia Navigation*) illustrates this point well. It also demonstrates the complex nature of shipping law and importantly it defined who the parties to a contract of affreightment are.

### 1 *Pyrene v Scindia Navigation*

In this case, a contract of affreightment was made by the buyers. The contract stipulated that the seller was obliged to deliver the goods under 'free on board' terms. Due to the negligence of the shipowner, the goods were damaged before they passed the ship's rail. Furthermore, no bill of lading in respect of the tender was ever issued—one had been prepared based on one of the usual forms used by the defendants, which incorporated the provisions of the *Carriage of Goods by Sea Act 1924* (Cth).<sup>20</sup> As the property had not passed to the buyer, the seller sued the shipowners, who subsequently admitted liability.

Two issues emerged; first, was the seller bound by the terms of the bill of lading? If so, the second question was whether the seller was a party to the contract of carriage. In addition, it had to be determined whether the seller has any remedies in tort. The first task of the court was to interpret the Hague-Visby Rules and understand their applicability to a free on board seller. Article I(e) of the Hague-Visby Rules states that the 'carriage of goods covers the period from the time when the goods are loaded on to the time when they are discharged from the ship'.<sup>21</sup>

The plaintiff argued that the interpretation of 'loading' goes beyond the physical aspect and reliance was placed on the decision in *Harris v Best, Ryley & Co*<sup>22</sup> (*Harris v Best*). It was held that 'loading is a joint operation, the shipper's duty being to lift the cargo to the rail of

---

<sup>19</sup> [1954] 2 QB 402.

<sup>20</sup> Ibid 405 (Devlin J).

<sup>21</sup> Hague Visby Rules art 1.

<sup>22</sup> (1892) 68 LT 76.

the ship, and the shipowner's to take it on board and stow it'.<sup>23</sup> The Court saw it differently and argued that the rights and liabilities under the rules do not attach to a period of time, but to a contract or part of a contract.<sup>24</sup> Devlin J stated:

The reference to 'when the goods are loaded on' in article I(e) is not, I think, intended to do more than identify the first operation in the series which constitutes the carriage of goods by sea; 'when they are discharged' denotes the last.<sup>25</sup>

His Honour continued:

It is no doubt possible to read article I(e) literally as determining the period as being from the completion of loading till the completion of discharging. But the literal interpretation would be absurd. Why exclude loading from the period and include discharging? How give effect to the frequent references to loading in other rules? How reconcile it with article VII which allows freedom of contract 'prior to the loading on and subsequent to the discharge from?' Manifestly both operations must be included.<sup>26</sup>

The Court was aware that it would be absurd to delete the loading operation as well as the discharging operation from the obligations of the carrier. The Court, adopting a practical point of view, therefore held that the carrier is charged by the Act to load and stow the cargo and hence, as art II of the Hague-Visby rules notes, loading and discharging are functions connected to the carriage of good by sea. It follows therefore that pursuant to art IV(5) the carrier can limit his liabilities as noted in the bill of lading. In effect, the Court overruled *Harris v Best*.

The next issue was whether a contract of carriage had been formed despite the fact that the bill of lading has not been issued pursuant to

---

<sup>23</sup> *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402, 414 (Devlin J).

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid* 416 (Devlin J).

<sup>26</sup> *Ibid.*

the obligation as noted in art I(b) of The Hague-Visby Rules. The important words are that ‘contract of carriage applies only to contracts of carriage covered by a bill of lading’.<sup>27</sup> Devlin J relied on commercial practices in relation to the bill of lading by stating:

In my judgment, whenever a contract of carriage is concluded, and it is contemplated that a bill of lading will, in due course, be issued in respect of it, that contract is from its creation ‘covered’ by a bill of lading, and is therefore from its inception a contract of carriage within the meaning of the rules and to which the rules apply.<sup>28</sup>

The fact that the terms of a bill of lading are known to the shipper was not in dispute. It is customary that the shipper inserts items into the bill which only he knew before it is handed to the master or tally clerk. Despite the fact that the buyers were, in fact, the shippers, the seller in this case still had to insert items into the bill pursuant to his obligations under the free on board terms. Hence the conditions of the carriage were already known to the plaintiff.

In this particular case, the physical carriage of goods by sea never took place. The Court noted that ‘when no shipment took place there was nothing in this contract, I think, to prevent the shipper from demanding under art III, rule 3, a “received for shipment” bill if it were of any use to him’.<sup>29</sup> The next question was one of privity of contract. The Court summarised the problem the following way:

A similar question has arisen before in relation to stevedores and other agents of the carrier. If the carrier employs a third party, such as stevedores, to perform part-of his duties under the contract of carriage, can the third party claim the protection of the contract; or can the shipper, if his goods are damaged, sue the third party in tort?<sup>30</sup>

---

<sup>27</sup> Hague Rules art 1(b) now changed to sea carriage document.

<sup>28</sup> *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402, 419.

<sup>29</sup> *Ibid* 420 (Devlin J).

<sup>30</sup> *Ibid*.

The Court referred to *Elder Dempster* and noted that the case was decided using the principle of agency. However, Devlin J suggested that *Elder Dempster* contained another ratio decidendi.<sup>31</sup> It can be summarised as follows:

I think the inference irresistible that it was the intention of all three parties that the seller should participate in the contract of affreightment so far as it affected him. This is the sort of situation that is covered by the wider principle; the third party takes those benefits of the contract which appertain to his interest therein, but takes them, of course, subject to whatever qualifications with regard to them the contract imposes.<sup>32</sup>

The Court held that it was not an agency relationship, rather the seller was participating in the contract of affreightment and hence is bound by the limitation rules.

### *E Commentary*

The interesting issue which emerges from this decision is that courts are prepared to take commercial practices into consideration and go beyond simply looking at express terms. To that end, the next chapter will briefly examine express and implied terms. As noted above, the contract of shipping, namely the bill of lading, is the most important document in which the relevant clauses are embedded and is the evidence of a contract of carriage. Hence the focus will be on the bill of lading and to a lesser extent on other areas of laws under which an aggrieved shipper or consignee can seek damages.

## II THE PRIVITY RULE: FOR OR AGAINST?

The Australian High Court case of *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*<sup>33</sup> (*Trident v McNiece*) is instructive on whether the privity rule should be accepted or modified. Despite

---

<sup>31</sup> Ibid 421 (Devlin J).

<sup>32</sup> Ibid 426 (Devlin J).

<sup>33</sup> (1988) 165 CLR 107.

deciding against the privity rule by a majority of 3 to 2, it is interesting to note the practical considerations advocated for in that case.

The facts are simple; an insurance company agreed to indemnify all persons engaged by the insured company at a specified building site. Subsequently, a person, not employed at the time the insurance was issued, was injured. The interesting point to note is that the Court also considered shipping contracts in their deliberations, which at that time already utilised the Himalaya clause.

Three considerations were outlined as follows:

In order to justify the privity and consideration rules in the face of these problems, three practical policy considerations are sometimes invoked. First, they preclude the risk of double recovery from the promisor by the third party as well as the promisee... The second point is that the privity requirement imposes an effective barrier to liability on the part of a contracting party to a vast range of potential plaintiffs.... The third matter is more important. The recognition of an unqualified entitlement in a third party to sue on the contract would severely circumscribe the freedom of action of the parties, particularly the promisee.<sup>34</sup>

As noted above, the Court enforced the third party right. Toohey J supplied the most comprehensive reason for allowing the appeal:

When an insurer issues a liability insurance policy identifying the insured in terms that evidence an intention on the part of both insurer and insured that the policy will indemnify as well those with whom the insured contracts for the purpose of the venture covered by the policy, and it is reasonable to expect that such a contractor may order its affairs by reference to the existence of the policy, the contractor may sue the insurer on the policy, even though consideration may not have moved from the contractor to the insurer or that the contractor is not a party to the contract between the insurer and insured.<sup>35</sup>

---

<sup>34</sup> Ibid 121–2 (Mason CJ and Wilson J)

<sup>35</sup> Ibid 107 (Toohey J).

As can be seen in this judgment, the privity rule did not sit comfortably with judges in many legal systems – specifically common law jurisdictions. It is not surprising that many statutory exceptions were drafted in order to give clarity.<sup>36</sup> As noted, civil law countries do not seem to have the same issue with the privity rule and have created relevant statutes to give third parties the right to demand performance.<sup>37</sup> In contrast, the United States of America ('US') had already done away with this principle in 1889.<sup>38</sup> However, in 1932, the first *Restatement Second of Contracts and Third Party Beneficiaries* ('*Restatement Second*')<sup>39</sup> fostered this development and sounded the death knell for the privity rule by formally recognising that certain third parties had independent rights in some contracts.<sup>40</sup>

#### *A The Restatement (Second) of Contracts and Third Party Beneficiaries*

When the *Restatement Second* was drafted, case law clearly demonstrated that a categorical approach was too simplistic to deal with novel and complex factual situations. Courts were often forced to place new cases into old categories; this lack of flexibility precluded an expanded categorical approach.<sup>41</sup> In the end, the 'intent to benefit' test was adopted in s 302 of *Restatement Second* which provides:

1. Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

---

<sup>36</sup> Examples include; *Insurance Contracts Act 1985* (Cth) s 48; *Bills of Exchange Act 1909* (Cth) ss 36–43, *Cheques Act 1986* (Cth) s 73; the *Motor Vehicles (Third Party Insurance) Act 1942* (NSW) s 10(7).

<sup>37</sup> As an example *German Law of Obligation* (Germany) 1 January 2002, BGB, 2002, 286, 324, 333.

<sup>38</sup> *Gifford v Corrigan* 117 NY 257, 22 NE 756 (1889).

<sup>39</sup> *Restatement (Second) of Contracts* § 302 (1979).

<sup>40</sup> David M Summers, 'Third Party Beneficiaries and the Restatement (Second) of Contracts' 67 *Cornell Law Review* 880, 881.

<sup>41</sup> *Restatement (Second) of Contracts* § 887 (1979).

- a. the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
  - b. the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
2. An incidental beneficiary is a beneficiary who is not an intended beneficiary.<sup>42</sup>

The provisions of the *Restatement Second* were less restrictive and gave courts the ability to ‘eliminate the automatic vesting provisions applicable to beneficiaries under the first Restatement’.<sup>43</sup> As with many statutory texts, the prescribed test is not sufficiently defined and hence the ‘intent to benefit’ test has been left to the courts to construe. The inevitable result is that it is either too restrictively or too broadly interpreted. A further problem is the fact that the *Restatement Second* gives no clear guidelines as to whose intent should govern a third party contract. Courts in general have disagreed on this issue.<sup>44</sup>

Blacks Law dictionary defines the word ‘intent’ as being ‘the state of mind with which an act is done or omitted’.<sup>45</sup> The comparison between the state of mind and good faith comes to mind as both terms defy definition and only take on substance if applied to a set of facts. It could be argued that courts simply ought to apply the principle of good faith and ask the question what the parties’ subjective intentions were when entering into the contract. Summers argues that:

Courts should focus on the promisee's intent to benefit the third party and the promisor's assent to that intent. Finally, courts should consider all the circumstances surrounding the making of the contract. By adopting these further guidelines, courts using the Restatement Second will promote greater predictability and clearer analysis of third-party beneficiary claims.<sup>46</sup>

---

<sup>42</sup> *Restatement (Second) of Contracts* § 302 (1979).

<sup>43</sup> *Ibid.*

<sup>44</sup> Summers, above n 40, 895.

<sup>45</sup> Black's Law Dictionary (5<sup>th</sup> ed, 1979) 757.

<sup>46</sup> Summers, above n 40, 899.

Despite an attempt at defining third party rights in the *Restatement Second*, it is arguable that the US has not eliminated the problems in interpretation of terms and hence exceptions to the rule have not diminished.

Not much has been written on the privity rule in recent years, especially in the common law sphere. It can be suggested that the privity rule is still in command, but the exceptions to the rule appear to give the necessary clarity in order to fill the gap left by it. It is interesting to note that many commentators and courts refer to shipping law jurisprudence, namely the Himalaya clause, as either an exception or explanation of how to circumvent the privity rule. Hence, the purpose of this article is to examine the Himalaya clause in a comparative sense to see whether the clause has found global acceptance, or has unified the exception to the privity rule, at least in one area of law. If the latter is true, it is arguable that transnational law reform has resolved a global problem.

### III THE ESTABLISHMENT OF THE HIMALAYA CLAUSE

#### *A Overview*

In maritime matters, clauses to protect contractually unconnected third parties were developed by decisions of the House of Lords and the Supreme Court of the United States just over 40 years ago.<sup>47</sup> Exemption clauses as such have been used before the seminal case of *Adler v Dickson*<sup>48</sup> was decided, which is referred to as the origin, at least in name, of the Himalaya clause.

The use of exemption clauses had occupied courts before the shift away from the privity rule occurred. This was not a sudden shift and glimmers of an evolutionary to a revolutionary change in contract law can be detected. In *Adler v Dickson*, the Court referred to cases such

---

<sup>47</sup> W Tetley, 'The Himalaya Clause—Revisited' (2003) 9 *Journal of International Maritime Law* 40, 42.

<sup>48</sup> [1955] 1 QB 158.

as *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd*<sup>49</sup> ('*Brandt v Liverpool*') and *Elder Dempster*. It is noteworthy that both cases were before the courts in the same year and that the judges presiding over the cases were not the same. Arguably the conclusion can be reached that a change in thinking was taking place which was not centred on particular judges but the judiciary in general.

### 1 *Brandt v Liverpool*

In *Brandt v Liverpool*, the question was whether an endorsee of a bill of lading could sue the carrier under the clauses contained in the bill of lading. In this case, bags of zinc ashes were shipped from Buenos Aires to Liverpool. Some of the bags were wet by rain before shipment, and as a result, the upper layers of bags in one of the holds became heated. The master of the vessel, fearing damage to the ship and other cargo, discharged most of the bags at Buenos Aires and placed them in a warehouse and after an unnecessary delay they were reconditioned and reshipped on another vessel and forwarded to their destination at extra costs.<sup>50</sup>

Once privity of contract was established, the Court examined and interpreted the clauses in the bill of lading. The Court accepted the proposition that the holder of the bill accepts the delivery and the carrier agrees that 'the contract so made by that offer and acceptance covers, so as to include, the terms of the bill of lading'.<sup>51</sup> However, the Court found that the only condition upon 'which [the ship] can rely is delay caused by prolongation of the voyage', however not a postponement, which was the situation in this case.<sup>52</sup>

The defence argued that the plaintiff was not a party to the contract and could not rely on its terms – in this case, the estoppel. Scrutton LJ observed:

This raises a novel point which has not in terms been considered by the authorities, as far as I know. Before the Bills of Lading

---

<sup>49</sup> [1924] G 1 KB 575.

<sup>50</sup> *Ibid* 575 (Atkin LJ).

<sup>51</sup> *Ibid* 589 (Atkin J).

<sup>52</sup> *Ibid* 601 (Atkin J).

Act, 1855, was passed, by the custom of merchants the indorsement of the bill of lading passed the property in the goods contained therein, but it did not assign the contract contained therein, and therefore the person who by indorsement became the owner of the goods did not by the same indorsement acquire a right to sue the shipowner upon his contract.<sup>53</sup>

However, when the *Bill of Lading Act 1855* (UK) ‘was passed, this difficulty was so far remedied that when the whole property passed by the indorsement to the indorsee, the contract also passed’.<sup>54</sup>

The Court, in the end, held that:

Although the plaintiffs, not being indorsees of the bill of lading to whom the property in the goods passed within the meaning of s 1 of the *Bills of Lading Act* (UK), could not sue on the contract contained therein, yet from the acts of presentation of the bill of lading, payment of the freight, and delivery and acceptance of goods specified in the bill of lading, there might and ought to be inferred & contract between the parties to deliver and accept the goods according to the terms of the bill of lading.<sup>55</sup>

It is interesting to speculate whether the Court wanted to extend the privity rule but found another way to connect an unconnected party to the contract. What can be said is that the Court left the door slightly ajar to a future extension or change to the privity rule.

The essential part of the payment of freight is that it constitutes the consideration necessary to imply a contract. The doctrine of implied terms is a matter of fact and not of law, and as seen in the development of the Himalaya clause, it is driven by the preparedness of the courts to give business efficacy to the transaction as seen in *Cia Portorasti Commerciale SA v Ultramar Panama Inc* (*The Captain Gregos*) (No 2).<sup>56</sup> Here, the Court found ‘very powerful grounds for concluding that it is necessary to imply a contract

---

<sup>53</sup> Ibid 594 (Atkin J).

<sup>54</sup> Ibid 595 (Atkin J).

<sup>55</sup> Ibid 575 (Atkin J).

<sup>56</sup> [1990] 2 Lloyd’s Rep 395.

between them and create the obligations which, we think, both parties believed to exist'.<sup>57</sup>

The law in this area is sufficiently advanced but not completely harmonised in an international sense to have overcome the problems of showing a contractual relationship between those who are bound to and can take advantage of contractual clauses, either in the bill of lading or in a charter party contract. Arguably, the attention of courts to protect parties from liability uncoupled from the privity rule was first discussed in *Elder Dempster*. The next important step was taken in *Adler v Dickson*.<sup>58</sup>

## 2 *Adler v Dickson*

The issue of the application of exemption clauses was further discussed and refined in this case. The facts are simple: the plaintiff was injured when mounting the gangway of the ship at a port of call. The exemption clause was contained in the ticket and the plaintiff sued in tort for negligence. The issue was whether the relevant clause was wide enough to not only limit the liability in contract but also in tort. The court commented that it is 'established that the plaintiff's accident and injuries were caused by the negligence of one or other or both of the defendants, neither of whom was, on the face of any document, in direct contractual relationship with the plaintiff'.<sup>59</sup> He also made the comment that, 'it is perhaps remarkable that the particular point which I am asked to decide never appears to have engaged the attention of the court in a claim for personal injuries'.<sup>60</sup>

Lord Denning referred to *Cosgrove v Horsfal*<sup>61</sup> and made the observation that nobody is protected by a contractual clause if they are not a party to it.<sup>62</sup> However, the defence noted that this conclusion was inconsistent with the decision in *Elder Dempster* where it was

---

<sup>57</sup> Ibid 403 (Bingham, Slade, Stocker LJJ).

<sup>58</sup> [1955] 1 QB 158.

<sup>59</sup> Ibid 168 (Pilchner J).

<sup>60</sup> Ibid.

<sup>61</sup> (1945) 62 TLE 140.

<sup>62</sup> Ibid.

held that it is well established in cases of carriage of goods by sea, that the master and crew are entitled to the protection of the exemption clauses 'and that there is no reason why they should not also be so entitled in the carriage of passengers'.<sup>63</sup>

The question whether the principle in *Elder Dempster* can also be extended to include passengers was answered in the affirmative in *Hall v North Eastern Railway Co.*<sup>64</sup> A drover was given a railway ticket by the Scottish rail company to travel from Scotland to England and while on the English line he was injured. The English rail company was not a party to the contract. Lord Denning noted:

The reason was, in Blackburn J's words, that the drover 'must be taken to have assented that the ticket should protect the North Eastern company just as well as the North British.' In short, it was a necessary implication that the English company should be protected.<sup>65</sup>

Arguably the issue reconciling the proposition that nobody can claim a benefit from a contract, except the parties and the width of an exemption clause, has not been properly resolved in *Elder Dempster*. Lord Denning argued that:

One suggestion, which was much canvassed, was that, in addition to the contract of carriage between the goods owner and the carrier (which was evidenced by the bill of lading), there were a number of collateral contracts between the goods owner and all the various persons concerned in the carriage.<sup>66</sup>

It is obvious that the argument, in relation to collateral contracts was not correct, as the contract was between the goods owner and the carrier and nobody else. The only point is whether other persons are also able to benefit from its terms. In this case, Lord Denning

---

<sup>63</sup> *Adler v Dickson* [1955] 1 QB 158, 181 (Denning, Jenkins and Morris LJJ).

<sup>64</sup> (1875) LE 10 QB 437.

<sup>65</sup> *Adler v Dickson* [1955] 1 QB 158, 183 (Denning, Jenkins and Morris LJJ).

<sup>66</sup> *Ibid* 182 (Denning, Jenkins and Morris LJJ).

suggested that they are able to benefit from it because ‘they participated in so far as it affected them and can take those benefits of it which appertain to their interest therein’.<sup>67</sup> In effect, that the shipper knew that the subcontractors were involved, is an implied term and by consenting to their involvement, they become protected despite the fact that they were not direct parties to it.

Lord Denning, however, made an important distinction when he stated:

The injured party must assent to the exemption of those persons. His assent may be given expressly or by necessary implication, but assent he must before he is bound: for it is clear law that an injured party is not to be deprived of his rights at common law except by a contract freely and deliberately entered into by him; and all the more so when the wrongdoer was not a party to the contract, but only participated in the performance of it.<sup>68</sup>

There is no doubt that at the time when *Adler v Dickson* was decided, this was the prevalent rule in cases of shipment of goods. As early as in *Elder Dempster* the Court was of the opinion that without the protection of subcontractors, it would ‘otherwise... be an easy way round the bill of lading’.<sup>69</sup> In any case, the exemption clause in *Adler v Dickson* only protected the steamship company, and Lord Denning stated that ‘servants or agents are therefore not excused from the consequences of their personal negligence’.<sup>70</sup> He also observed that even if the steamship company intended to cover their servants, he saw nothing whatever to suggest that Mrs Adler knew of their intention or assented to the inclusion of the servants.<sup>71</sup> The Court, therefore, concluded that ‘since the contract neither expressly nor by necessary implication deprived the plaintiff of her right to sue the

---

<sup>67</sup> Ibid 183 (Denning, Jenkins and Morris LJJ).

<sup>68</sup> Ibid 184 (Denning, Jenkins and Morris LJJ).

<sup>69</sup> *Elder Dempster & Co Ltd v Paterson Zochonis & Co Ltd* [1924] AC 522, 522 (Lord Sumner).

<sup>70</sup> Ibid 707 (Lord Sumner).

<sup>71</sup> Ibid.

defendants in tort, she was entitled to pursue her claim against them'.<sup>72</sup>

### B Conclusion

In sum, the lacuna which was exposed was firstly that the exemption clause available to the carrier needs to extend to every servant, agent or independent contractor of the carrier acting as such. Secondly, the clause needs to establish that the carrier is, for purposes of all the foregoing provisions of the clause, acting on behalf of all such servants, agents and independent contractors. This position has been taken not only in England, but also in Australia<sup>73</sup> and the US,<sup>74</sup> as well as the *Carriage of Goods by Sea Act 1924* (Cth) art IV(2). Specifically, the *Carriage of Goods by Sea Act 1924* (Cth) pointing to a protection of all participants in the supply chain has caused the courts to examine the clash between the Act and the well-established principle that no one can claim the benefit of a contract except a party to it. This article will attempt to trace the development of the Himalaya clause in several jurisdictions and investigate whether the development is complete.

The main issue is whether and how independent contractors can take advantage of exemption clauses against the cargo owners. Generally speaking, independent contractors are not contractual parties in a bill of lading or charter party. Therefore courts needed to develop a 'fully fledged exception to the doctrine of Privity of contract, thus escaping from all the technicalities with which courts [were] faced in English law'.<sup>75</sup> The problem is that three issues need to be resolved. First, what consideration are third parties rendering; secondly, where is the authority of third parties to act on behalf of the shipowner; and thirdly, how are consignees of the cargo bound to terms within the bill of lading?

---

<sup>72</sup> Ibid 680 (Lord Sumner).

<sup>73</sup> *Gilbert Stokes & Kerr Pty v Dalgety & Co* (1948) 81 LIL 337.

<sup>74</sup> *Collins v Panama* (1952) 197 Fed Rep 983.

<sup>75</sup> *The Mahkutai* [1996] AC 650, 665 (Lord Goff).

## IV THE ENGLISH DEVELOPMENT

### *A Overview*

Since *Adler v Dickson*, courts considered the extent to which a Himalaya clause can protect third parties. The first flirtation of establishing a basis on which stevedores can claim protection under the clauses in a bill of lading can be found in *Midland Silicones Ltd v Scruttons Ltd* ('*Midland v Scruttons*').<sup>76</sup> Subsequent cases have added and refined the clause to the extent that today non-contractual parties are protected by the clause contained within the bill of lading or the charter party. English case law has also influenced not only other common law countries but civil law countries, such as Germany, and mixed systems such as South Africa.

#### 1 *Midland v Scruttons*

This case is of some significance as it is 'the first case ever recorded in... English books where the owner of goods has sued a stevedore for negligence'.<sup>77</sup> The stevedores negligently damaged a drum of chemical and attempted to rely on the exceptions and limitations contained in the bill of lading. The plaintiff relied on the principle of bailment on terms as explained in *Elder Dempster*. Furthermore, they also relied on an implied contract as contained in the bill of lading. The Court reasserted the privity rule; in effect rejecting the decision in *Elder Dempster*. Furthermore, they gave the issue of bailment on terms a very restrictive treatment. The Court held:

It is a fundamental principle that only a person who is party to a contract can sue upon it, and a stranger to a contract cannot in question with either of the contracting parties, take advantage of provisions of the contract even where it is clear from the contract that some provision in it was intended to benefit him.<sup>78</sup>

---

<sup>76</sup> [1962] AC 446.

<sup>77</sup> Ibid 491 (Lord Denning).

<sup>78</sup> Ibid 447 (Lord Denning).

The question of implied terms was raised which, as the Court noted, has the purpose of giving ‘business efficacy to a contract’.<sup>79</sup> This argument was dismissed as the Court correctly noted that the shipper has a contract with the carrier but does not care how the carrier discharges his contractual duties. If the carrier contracts with a stevedore, that would be entirely within the carrier’s responsibility, and the shipper is not included in this transaction. The issue of extending the contractual relationship to an undisclosed principal or beneficiary prompted Viscount Simonds to state ‘for me heterodoxy, or, as some might say, heresy is not the more attractive because it is dignified by the name of reform’.<sup>80</sup>

Furthermore the Court made it clear that ‘if the principle of *jus quaesitum tertio* is to be introduced into our law, it must be done by Parliament after a due consideration of its merits and demerits’.<sup>81</sup> It is very interesting how the Court dealt with analysing *Elder Dempster*. Viscount Simonds commenced his discussion by noting:

When, therefore, it is urged that the *Elder Dempster* case decided that, even if there is no general exception to what I have called the fundamental rule that a person not a party to a contract cannot sue to enforce it, there is at least a special exception in the case of a contract for carriage of goods by sea, an exception which is to be available to every person, servant or agent of the contracting party or independent contractor.<sup>82</sup>

The importance of this statement is that the Court completed the view that in cases of shipping, the strict contract rule is not conducive. After observing that the facts in *Elder Dempster* were distinguishable, the question was whether there is a clear principle of law which can be extracted from the *Elder Dempster* case in order to change the law on the principle of contractual obligations. The answer was in the negative and in arriving at that conclusion, he relied on *Wilson v Darling Island Stevedoring and Lighterage Co Ltd*.<sup>83</sup>

---

<sup>79</sup> Ibid 466–77 (Viscount Simonds).

<sup>80</sup> Ibid 467 (Viscount Simonds).

<sup>81</sup> Ibid 468 (Viscount Simonds).

<sup>82</sup> Ibid 469 (Viscount Simonds).

<sup>83</sup> (1956) 95 CLR 43.

Lord Reid acknowledged that this case was brought to the Court as a test case, relying on *Tweddle* and *Dunlop*, in which the privity rule was firmly established. The Court however left open situations where one of the parties contracts as agent for the third person. Lord Reid made this position clear when he said:

I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.<sup>84</sup>

This passage proved to be the essential argument in the development of the Himalaya clause as first noted in *Adler v Dickson*. However, in the present case the problem was that Lord Reid could not elicit the fact that the carrier was contracting as agent for the stevedore in addition to contracting on his own behalf. Hence the privity rule still applied. From a practical point of view, though, it would be extremely unlikely that the carrier would be an agent of a stevedore as in practice, it is the other way round and hence viewing it from Lord Reid's point of view, the privity rule always applies.

As courts are bound by precedents, Lord Reid found it necessary to explain why the *Elder Dempster* case was not a precedent. He observed:

I would certainly not lightly disregard or depart from any ratio decidendi of this House. But there are at least three classes of case where I think we are entitled to question or limit it: first, where it is obscure, secondly, where the decision itself is out of line with other authorities or established principles, and thirdly, where it is much wider than was necessary for the decision so that it becomes a question of how far it is proper to distinguish

---

<sup>84</sup> *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446, 474 (Lord Reid).

the earlier decision. The first two of these grounds appear to me to apply to the present case. It can hardly be denied that the E of the *Elder Dempster* decision is very obscure<sup>85</sup>... It is also of interest to note that Lord Keith of Avonholm commented that “It may be difficult to discover any common ratio decidendi in the speeches of their Lordships who decided the *Elder Dempster* case”.<sup>86</sup>

Simply put, the Court could not extract a ratio decidendi from previous cases and hence the privity rule was still the deciding factor. Of importance is the dissenting judgment of Lord Denning. He commences his analysis by pointing out that two contracts are of importance:

Now, there are two principal questions in this case which need separate consideration: The first is whether the stevedores can rely on the limitation clause in the bill of lading to which they were not parties: The second is whether they can rely on the protection given by the stevedoring contract to which they were parties.<sup>87</sup>

Lord Denning points to the exact problem, namely; if the privity rule is applied, then the exemption clause cannot flow from the first contract to the second one as described above. The issue, of course, is how can the two contracts be linked? Can the limitation clause flow from contract one to contract two? *Elder Dempster* decided that it can by stating that ‘servants or agents who act under that contract have the benefit of the exemption clause’.<sup>88</sup>

Lord Denning argued that one ‘cannot understand the *Elder Dempster* case without some knowledge of the previous law and I would draw the attention of your Lordships to it’.<sup>89</sup> He noted that the privity rule is an invention of the nineteenth century and is not rooted in legal history at all. The importance of *Elder Dempster*, was that they

---

<sup>85</sup> Ibid 476–7 (Lord Reid).

<sup>86</sup> Ibid 481 (Lord Keith).

<sup>87</sup> Ibid 482 (Lord Denning).

<sup>88</sup> Ibid 483 (Lord Dennings).

<sup>89</sup> Ibid.

viewed the contract from the point of view of principal and agent hence ‘the charterers and their agents’ were not liable and as a second reason through bailment upon terms, which ‘include the exceptions and limitations stipulated in the known and contemplated form of bill of lading’.<sup>90</sup>

Arguably, Lord Denning was instinctively aware that the wording of the clause ultimately will decide who is protected and who is not once the hurdle of the privity rule has been overcome. In essence, *Midland v Scruttons* indicated that *Elder Dempster* has ‘shown a light’ in relation to overcoming the privity rule. Lord Denning recognised this in dissenting to the arguments of the majority of the House. Considering that *Midland v Scruttons* was decided after *Adler v Dickson*; it is arguable that the Himalaya clause was first thought of in *Elder Dempster* and not *Adler v Dickson*. The question remains; did *Elder Dempster* or *Adler v Dickson* provide the impetus for the ‘birth’ of the Himalaya clause?

## 2 *The Eurymedon*

The Court in *New Zealand Shipping v Satterthwaite Ltd (PC) the Eurymedon*<sup>91</sup> (*the Eurymedon*) reaffirmed the protection granted to subcontractors by the Himalaya clause against claims of tort. Here, the stevedores acted negligently in damaging a drilling machine. The Court referred to Lord Reid’s comments in *Midland v Scruttons*,<sup>92</sup> especially the four criteria set out above.<sup>93</sup> Lord Wilberforce was convinced that the first three criteria were satisfied; the only issue being whether the fourth one, namely the question of consideration, was also satisfied.<sup>94</sup>

In *The Eurymedon*, the important and necessary part of the exemption clause on the bill of lading notes:

---

<sup>90</sup> Ibid 487 (Lord Denning).

<sup>91</sup> [1975] AC 154.

<sup>92</sup> [1962] AC 446.

<sup>93</sup> Ibid 474 (Lord Reid).

<sup>94</sup> *New Zealand Shipping v Satterthwaite Ltd (PC) the Eurymedon* [1975] AC 154, 167 (Lord Wilberforce).

It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner of the goods or to any holder of this bill of lading for any loss or damage or delay of whatsoever kind arising or resulting directly or indirectly from any act neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this bill of lading.<sup>95</sup>

The Court agreed that the ‘exemption is designed to cover the whole carriage from loading to discharge, by whomsoever it is performed: the performance attracts the exemption or immunity in favour of whoever the performer turns out to be’.<sup>96</sup>

Lord Wilberforce, referring to those criteria, stated:

The question in this appeal is whether the contract satisfies these [requirements]. Clause 1 of the bill of lading, ..., is clear in its relevant terms. The carrier, on his own account, stipulates for certain exemptions and immunities: ... In addition to these stipulations on his own account, the carrier as agent for (inter alias) independent contractors stipulates for the same exceptions.<sup>97</sup>

---

<sup>95</sup> Ibid 165 (Lord Wilberforce).

<sup>96</sup> Ibid 167 (Lord Wilberforce).

<sup>97</sup> Ibid.

Much was made of the fact that the carrier also contracts as agent for numerous other persons; the relevance of this argument is not apparent. It cannot be disputed that among such independent contractors, for whom, as an agent, the carrier contracted, is the appellant company which habitually acts as a stevedore in New Zealand by arrangement with the carrier and which is, moreover, the parent company of the carrier. The carrier was, undisputedly, authorised by the stevedore to contract as its agent for the purposes of clause 1. All of this is quite straightforward and was accepted by all the judges.<sup>98</sup>

However, the question was whether consideration was provided. The Court answered this question in the affirmative by suggesting:

[The] initial unilateral bargain was capable of becoming mutual between the shipper and the appellant, made through the carrier as agent. The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the appellant should have the benefit of the exemptions and limitations contained in the bill of lading.<sup>99</sup>

Furthermore, the Court made it clear that that the consignee is entitled to the benefit of the bill of lading by his acceptance and hence is also bound by its terms, including the Himalaya clause.<sup>100</sup> The Court made it clear that the exemption clause ‘brought into existence a bargain initially unilateral but capable of becoming mutual between the shipper and the stevedore’<sup>101</sup> and ‘this became a full contract when the stevedore performed the services by discharging the goods’.<sup>102</sup>

Lord Wilberforce also noted that a United States District Court came to the same conclusions.<sup>103</sup> Arguably, the Court recognised that

---

<sup>98</sup> Ibid 154 (Lord Wilberforce, Lord Hodson, Viscount Dilhorne, Lord Simon of Glaisdale and Lord Salmon).

<sup>99</sup> Ibid 168 (Lord Wilberforce).

<sup>100</sup> Ibid.

<sup>101</sup> Ibid 167–8 (Lord Wilberforce).

<sup>102</sup> Ibid.

<sup>103</sup> *Carle & Montanari Inc. v American Export Isbrandtsen Lines Inc.* [1968] 1 Lloyd's Rep 260.

shipping is an international adventure requiring a harmonised approach. However, this is unfortunately not always the case as some courts are still compelled to follow the principle of the law of contract or of agency.<sup>104</sup>

This case clearly demonstrated that the Himalaya clause contained in a bill of lading expresses the commercial reality of shipping as it gives a ‘clear intention of a commercial document, and can be given within existing principles’.<sup>105</sup> The Court did not see any reason to strain the law or the facts in order to defeat these intentions specifically, as the exemption clauses have been accepted by shippers against carriers, the existence and presumed efficacy of which is reflected in the rates of freight.<sup>106</sup>

3 *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd (‘The New York Star’)*<sup>107</sup>

This was an appeal from the High Court of Australia to the Privy Council. This case turned on the issue of whether the stevedores were protected under tort as they allowed persons to remove goods without the presentation of a bill of lading. The outcome was in favour of the stevedores. The question which occupied the Court was whether the bill of lading was still operative while the goods were already offloaded – that is, after they had crossed the ships rail. When the loss occurred, the goods were discharged and were no longer in the custody of the carrier. The Court in the first instance noted that the stevedore was not acting as a subcontractor under the bill of lading

---

<sup>104</sup> *The Mahkutai* [1996] AC 650, 664 (Lord Goff of Chieveley, Lord Jauncey of Tullichettle, Lord Nicholls of Birkenhead, Lord Hoffmann and Sir Michael Hardie Boys).

<sup>105</sup> *New Zealand Shipping v Satterthwaite Ltd (PC) the Eurymedon* [1975] AC 154, 169 (Lord Wilberforce).

<sup>106</sup> *Ibid.*

<sup>107</sup> (1980) 144 CLR 300.

but rather as a bailee. It follows that the liability of the stevedores was independent of and not governed by the clauses of the contract.<sup>108</sup>

In the appeal to the Privy Council Lord Wilberforce commented that the significance of the *New York Star* was not as a legal principle but rather ‘in the finding that in the normal situation involving the employment of stevedores by carriers, accepted principles enable and require the stevedore to enjoy the benefit of contractual provisions in the bill of lading’.<sup>109</sup> It was agreed that the relationship between carriers and stevedores might vary from case to case, however ‘the decision does not support ... a search for fine distinctions which would diminish the general applicability in the light of established commercial practice of the principle’.<sup>110</sup> The Court looked at the facts closely and proceeded with the construction of the clauses in the bill of lading. Clause 8 stated that ‘delivery of the goods shall be taken by the consignee or holder of the bill of lading from the vessel’s rail immediately when the vessel is ready to discharge, berthed or not berthed’.<sup>111</sup>

The Court considered this clause relevant to understanding what happens in a practical sense, i.e. that consignees rarely take delivery directly from the ship’s rail, but after some time near or at the wharf. Therefore, it was contemplated that the carrier would employ a subcontractor which explains the interrelationship between clauses 5 and 8. Clause 5 states that the carrier’s responsibility ends as soon as the goods leave the ships tackle. The remainder of the clause notes that the carrier still has some responsibilities after the goods are discharged. This is commercially unreal and not contemplated by the

---

<sup>108</sup> *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd* (1980) 144 CLR 300, 307 (Lord Wilberforce, Lord Diplock, Lord Fraser of Tullybelton, Lord Scarman and Lord Roskill).

<sup>109</sup> *Ibid* 304 (Lord Wilberforce, Lord Diplock, Lord Fraser of Tullybelton, Lord Scarman and Lord Roskill).

<sup>110</sup> *Ibid* 306 (Lord Wilberforce, Lord Diplock, Lord Fraser of Tullybelton, Lord Scarman and Lord Roskill).

<sup>111</sup> *Ibid* 309 (Lord Wilberforce, Lord Diplock, Lord Fraser of Tullybelton, Lord Scarman and Lord Roskill).

bill of lading.<sup>112</sup> There is nothing in clause 8 which is inconsistent with the obligations as per clause 5. However, of importance is that clause 5 attributes responsibility to the carrier as a bailee and defines the period as ‘continuing after leaving the ships tackle’.<sup>113</sup>

The Court posed the question of what would happen if the carrier himself would stack the containers on the wharf? The answer is clearly that he would still be protected. Their Lordships, therefore, found that if the carrier employs a stevedore, the situation would not change and hence the stevedore can take full advantage of the limitation clauses in the bill of lading. *The New York Star* again explains how judges in England are aware of commercial realities which are never far away when interpreting terms in the bill of lading containing a Himalaya clause.

This case was decided after an appeal from the High Court of Australia<sup>114</sup> where the decision was overturned. It is instructive to note how the Australian High Court viewed the Himalaya clause. Barwick CJ delivered the dissenting judgment noting that:

Questions as to how far, if at all, someone not a party to a contract, but for whose benefit it is made, can enforce the agreement made between others, do not arise. The decision in *The Eurymedon* (1975) AC 154 made the stevedore a party to the relevant parts of the bill of lading. It is, in my opinion, that feature of the decision which is so significant and important for the commercial community, particularly that section which is concerned with the transport of goods.<sup>115</sup>

He specifically observed:

Their Lordships' decision in *the Eurymedon* was of great moment in the commercial world and, if I may say so, an outstanding example of the ability of the law to render effective

---

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1978) 139 CLR 231.

<sup>115</sup> Ibid 244 (Barwick CJ).

the practical expectations of those engaged in the transportation of goods. It is not a decision of its nature to be narrowly or pedantically confined. It established, as I have said, that the acceptance of the bill of lading by the consignor followed by the acts of the stevedore produced a binding contract to which consignor and stevedore were parties.<sup>116</sup>

He had no difficulty finding that a contract existed between all those who participated in the maritime venture based on the bill of lading. It is therefore not surprising that Barwick CJ, following the reasons are given in *the Eurymedon*, allowed the appeal. In the end, the Court rejected the stevedore's arguments and found against following the arguments as put forward in *the the Eurymedon*. But as noted above, the Privy Council saw it differently and overturned the Australian decision.

#### 4 *The Pioneer Container*<sup>117</sup> ('*Pioneer Container*')

Goods were shipped from Taiwan to Hong Kong under a feeder bill. The vessel collided with another ship and sunk. The plaintiffs commenced litigation in Hong Kong. The carriage of goods was subcontracted and each bill of lading contained clause 4(1) which provided:

The carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by the carrier in relation to the goods.<sup>118</sup>

As there was no contractual relationship between the plaintiffs and the shipowners, the issue that arose was whether the shipowner can rely on the exclusive jurisdiction clause in the bill of lading (clause 26) which named Taiwan as the forum and whether the clause was binding on all the plaintiffs. Lord Goff immediately looked at the central problem and started with commercial considerations:

---

<sup>116</sup> Ibid 250 (Barwick CJ).

<sup>117</sup> [1994] 2 AC 324.

<sup>118</sup> Ibid 334 (Lord Goff).

It [is] right to observe, at the outset, that in commercial terms it would be most inconvenient if these two groups of plaintiffs were not so bound. ... Common sense and practical convenience combine to demand that all of these claims should be dealt with in one jurisdiction, in accordance with one system of law.<sup>119</sup>

It is often the case, especially when transshipment or subcontracting arises, that commercial reality dictates that a common solution ought to be a prime objective. As Lord Goff noted, 'if this cannot be achieved, there may be chaos'.<sup>120</sup> He also pointed to the issue that English law still maintains, though with increasing criticism: the privity rule. The issue was noted by Lord Goff: '[h]ow long these principles will continue to be maintained in all their strictness is now open to question'.<sup>121</sup> In this case again, there was no contractual relationship between the shipowners and certain cargo owners.

Their Lordships turned their attention to the issue of bailment and sub-bailment and whether the Himalaya clause, which was part of the bill of lading, protects all parties concerned in the supply chain. In relation to the Himalaya clause, counsel for the plaintiff argued:

The 'Himalaya' clause gives sufficient effect to the commercial expectations of the parties, and that to allow a sub-bailee to take advantage of the terms of his own contract with the bailee was not only unnecessary but created a potential inconsistency between the two regimes.<sup>122</sup>

However the Court saw it differently as they pointed out that 'the mere fact that such a clause is applicable cannot ... be effective to oust the sub-bailee's right to rely on the terms of the sub-bailment as against the owner of the goods'.<sup>123</sup> It goes without saying that here is no inconsistency as the plaintiff can simply choose the terms which are most favourable to him. The conclusion is that this case

---

<sup>119</sup> Ibid 334–5 (Lord Goff).

<sup>120</sup> Ibid.

<sup>121</sup> Ibid 335 (Lord Goff).

<sup>122</sup> Ibid 344 (Lord Goff).

<sup>123</sup> Ibid.

established that two regimes are potentially applicable: first, the Himalaya clause (a contractual issue); and secondly, the bailment or sub-bailment as they are applicable in their own right without creating any inconsistencies. The Court in effect agreed with the defendant that ‘the doctrine of sub-bailment does not bind the bailor to a contract to which he was not a party. He is bound by reason of a separate relationship based on privity of bailment’.<sup>124</sup>

*5 The Mahkutai*<sup>125</sup> (‘*Mahkutai*’)

The vessel was on a time charter and was later sub-chartered on a voyage charter by P T Rejeki Sentosa (‘Sentosa’) who contracted with P T Jabarwood (‘the shippers’) to transport wood from Indonesia to China. A clean bill of lading (Sentosa's form of bill) was issued providing that ‘for further terms and conditions the clauses as stipulated in the bill of lading will apply’.<sup>126</sup> The bill of lading, as far as relevant, contained the following clauses allowing for subcontracting :

4. Subcontracting

- i. The merchant undertakes that no claim or allegation shall be made against any servant, agent or subcontractor of the carrier, including but not limited to stevedores and terminal operators, which imposes or attempts to impose upon any of them or any vessel owned by any of them any liability whatsoever in connection with the goods and, if any such claim or allegation should nevertheless be made, to indemnify the carrier against all consequence thereof. Without prejudice to the foregoing, every such servant, agent and subcontractor shall have the benefit of all exceptions, limitations, provision, conditions and liberties herein benefiting the carrier as if such provisions were expressly made for their benefit, and, in entering into this contract, the

---

<sup>124</sup> Ibid 329 (Lord Goff).

<sup>125</sup> [1996] AC 650 (Lord Goff).

<sup>126</sup> Ibid 656 (Lord Goff).

carrier, to the extent of these provisions, does so not only on as [sic] own behalf, but also as agent and trustee for such servants, agents and subcontractors. The carrier shall be entitled to be paid by the merchant on demand any sum recovered or recoverable by such merchant from any such servant, agent or subcontractor of the carrier for any loss, damage, delay or otherwise,

- ii. The expression 'subcontractor' in this clause shall include direct and indirect subcontractors and their respective servants and agents.

#### 19. Jurisdiction clause

The contract evidenced by the bill of lading shall be governed by the law of Indonesia and any dispute arising hereunder shall be determined by the Indonesian courts according to that law to the exclusion of the jurisdiction of the courts of any other country.<sup>127</sup>

After the vessel had arrived at Shantou in China, it was discovered that the timber was damaged by sea water. The vessel proceeded to Hong Kong where the owners of the timber sued for damages. The shipowners issued a summons seeking a stay of proceedings relying on clause 19 of the bill of lading. The Hong Kong Court of Appeal noted that the shipowners were not a party to the bill of lading which contained the Himalaya clause and hence the stay of proceedings was not upheld. The parties were granted leave to appeal to the Privy Council.

The Privy Council commented that the two principles, the desirability of recognition of modification to the strict doctrine of privity of contract on one hand and the accommodation of allowing certain terms of the contract to be made available to parties involved in the maritime adventure but are not parties to the contract, have not been

---

<sup>127</sup> Ibid 656–57 (Lord Goff).

totally reconciled into a doctrine.<sup>128</sup> It is therefore 'inevitable that technical points of contract and agency law will continue to be invoked'.<sup>129</sup> As seen above, the readiness of allowing such claims (as seen in *Elder Dempster*) has been moving back to the direction of orthodoxy specifically in *Midland v Scruttons*. In recent years it has swung back again in the *Eurymedon* and *the New York Star*.

In *the Mahkutai* their Lordships turned to the application of the principles as elicited in the *Eurymedon*. Two questions needed to be answered. First, whether the shipowners qualified as subcontractors within the meaning of the Himalaya clause as noted in clause 4 of the bill of lading and secondly, whether the shipowners can take advantage of the exclusive jurisdiction clause in the contract.<sup>130</sup> The exclusive jurisdiction clause was addressed with the assumption that the shipowners were subcontractors.

The question was whether the jurisdiction clause falls within the Himalaya clause which notes that subcontractors have the benefit of 'all exceptions, limitations, provision, conditions and liberties herein benefiting the carrier as if such provisions were expressly made for their benefit'.<sup>131</sup> As most bills of lading incorporate The Hague-Visby Rules in which responsibility and liabilities for the benefit of the carrier are contained, primarily in art IV, the point is that subcontractors can also derive the same benefit if the Himalaya clause is drafted wide enough to do so. Three crucial words within the Himalaya clause were highlighted by the Court; *exceptions*, *limitations* and *provision*.

The first question was whether the jurisdiction clause is an exemption or a limitation. Their Lordships stated:

Such a clause can be distinguished from terms such as exceptions and limitations in that it does not benefit only one party, but embodies a mutual agreement under which both

---

<sup>128</sup> Ibid 658 (Lord Goff).

<sup>129</sup> Ibid 664 (Lord Goff).

<sup>130</sup> Ibid 665 (Lord Goff).

<sup>131</sup> Ibid.

parties agree with each other as to the relevant jurisdiction for the resolution of disputes<sup>132</sup>

The second question was whether the jurisdiction clause is a provision. The Court noted that the jurisdiction clause it is not a provision as it cannot be extended to include a mutual agreement which follows naturally from the observation above. This view is supported by looking at the function of the Himalaya clause. Their Lordships defined the function of the Himalaya clause to ‘prevent cargo owners from avoiding the effect of contractual defences available to the carrier (typically the exceptions and limitations in the Hague-Visby Rules) by suing in tort persons who perform the contractual services on the carrier's behalf’.<sup>133</sup>

Importantly the Court distinguished this case with the decision in *The Pioneer Container*. In that case the goods were subcontracted under a feeder bill of lading and the Himalaya clause contained the words ‘on any terms’. The Court noted that in this case they were only interested in the question ‘whether a subcontractor is entitled to take the benefit of a term in the head contract’.<sup>134</sup>

The Court answered in the affirmative but clearly noted that ‘those terms did not include the exclusive jurisdiction clause’.<sup>135</sup> Of importance is that the Court also observed:

It has however to be recognised that, so long as the principle continues to be understood to rest upon an enforceable contract as between the cargo owners and the stevedores entered into through the agency of the shipowner, it is inevitable that technical points of contract and agency law will continue to be invoked by cargo owners seeking to enforce tortious remedies against stevedores and others uninhibited by the exceptions and limitations in the relevant bill of lading contract.<sup>136</sup>

---

<sup>132</sup> Ibid 666 (Lord Goff).

<sup>133</sup> Ibid.

<sup>134</sup> *The Mahkutai* [1996] AC 650, 667 (Lord Goff).

<sup>135</sup> Ibid 668 (Lord Goff).

<sup>136</sup> Ibid 664 (Lord Goff).

Lord Goff arguably advanced the public policy rationale when he stated that ‘the bold step taken by the Privy Council in *the Eurymedon*, and later developed in *the New York Star*, has been widely welcomed’.<sup>137</sup>

6 *Lotus Cars Ltd v Southampton Cargo Handling Plc*<sup>138</sup> (*The Rigoletto*)

Seven Lotus Esprit cars were destined to be shipped on the *Rigoletto*. Lotus prepared a standard shipping note to the road haulier. At the port, a representative from the stevedores, who were also appointed as cargo handles by the Associated British Ports, received the cars. The cars were physically received by the stevedores and driven into a locked vehicle compound from where one of the cars was later stolen. The remaining cars were loaded onto the *Rigoletto* and a bill of lading was issued on behalf of the carrier in their standard form.

The Court distinguished between four potential contractual relationships, first the one between Lotus and the stevedore, secondly the one between the stevedores and the Ports, thirdly the one between the stevedores and the shipowner and fourthly the one between Lotus and the shipowner. Lotus claimed against the stevedores and the Port in bailment and under the terms of the shipping note. The Court in the end held that the stevedores (SCH) were liable to Lotus. The Court set out the relevant documents of the four possible contracts.

(a) *The SCH Conditions*

The conditions by which the stevedores accept goods were ‘construed as reversing the burden of proof in bailment so that [the stevedores] accepted liability if negligence was proven against them’.<sup>139</sup> The Court only found cl 18 of importance which stated:

The user shall include in its bill of lading a provision that [the stevedores] its employees, agents and subcontractors shall have

---

<sup>137</sup> Ibid.

<sup>138</sup> *Lotus Cars Ltd v Southampton Cargo Handling Plc* [2000] 2 Lloyd’s Rep 532.

<sup>139</sup> Ibid 535 [11] (Rix LJ).

the benefit of any terms in such a bill of lading excluding or limiting the liability of the user in respect of cargo.<sup>140</sup>

User under clause 1(e) was defined to include shipper and shipowner.

(b) *The bill of lading*

The bill of lading included the following terms which are relevant:

2. Responsibility

The Carrier or his Agents shall not be liable for loss of or damage to the goods during the period before loading or after discharge howsoever such loss or damage arises.

7. Loading, Discharging and Delivery

Carrier's Agent unless otherwise agreed. Landing, storing and delivery shall be for the Merchant's account. Loading and discharging may commence without previous notice. ... The Merchant or his Assign shall tender the goods when the vessel is ready to load and as fast as the vessel can receive. ... The Merchant or his Assign shall take delivery of the goods and continue to receive the goods as fast as the vessel can deliver. ... Otherwise the Carrier shall be at liberty to discharge the goods and any discharge to be deemed to be a true fulfilment of the contract. ... If the goods are not applied for within a reasonable time, the Carrier may sell the same privately or by auction.

16. Exemptions and immunities of all Servants and Agents of the Carrier

It is hereby expressly agreed that no servant or agent of the Carrier (including every independent Contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Merchant for any loss, damage or delay arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment

---

<sup>140</sup> Ibid.

and, but without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature acceptable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such Servant or Agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the Carrier is or shall be deemed to be acting as Agent or Trustee on behalf of and for the benefit of all persons who are or might be his Servants or Agents from time to time (including independent Contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract evidenced by this bill of lading...The Carrier shall be entitled to be paid by the Merchant on demand any sum recovered or recoverable by the Merchant or any other from such Servant or Agent of the Carrier for any such loss, damage or delay or otherwise.<sup>141</sup>

The terms and conditions of the other two contracts, namely between SCH and the shipowner and between SCH and the Port Authorities, were not relevant to the Court's decision.

Lord Justice Rix of the Court of Appeal turned to the three issues argued in this appeal. First he asked the question whether SCH were bailees. In response to the applicant his Lordships argued SCH were agents of the shipowner but they were not their servants 'nor is the agency of an independent contractor incompatible with bailment. Moreover, the fact that a person may owe duties in more than one direction does not mean that he cannot be a bailee'.<sup>142</sup>

The shipping note stated that 'Lotus is the exporter, Lotus prepared the note, and it was signed for Lotus. It also contains a statement that 'the company preparing this note makes a declaration that the goods are properly described, and asks the receiving authority to receive the goods described for shipment subject to the latter's

---

<sup>141</sup> Ibid 536 [16] (Rix LJ).

<sup>142</sup> Ibid 539 [39] (Rix LJ).

terms'.<sup>143</sup> Lord Justice Rix accepted that the shipping note is a direct contract between the two parties. The next question was whether the Himalaya clause was wide enough to protect SCH under a separate contract evidenced by the bill of lading.

Lord Justice Rix started with the assumption that the Himalaya clause provides SCH with a complete defence.<sup>144</sup> If it does, the question is whether the liability under the shipping note is replaced by the limitations contained under the bill of lading. Simply put, which contract takes precedent and can SCH choose which of the two contracts is more advantageous to them. In addition, Rix LJ also noted that the dictum of Lord Goff in *the Pioneer Container* does not apply, as Lord Goff made it clear that 'their Lordships are therefore satisfied that the mere fact that a Himalaya clause is applicable does not of itself defeat the shipowners' argument on this point'.<sup>145</sup> In this case, SCH had already made the choice and hence has no ability to subsequently change its mind.

His Lordship, before coming to a conclusive decision, suggested that it would only be proper 'to try to read the two contractual regimes together. Where there is inconsistency, it would be in accordance with principle to think that an acceptance of liability was intended to take effect over an exclusion of liability'.<sup>146</sup> He concluded that:

For all or any of these reasons, I think that even if the Himalaya clause could otherwise apply to SCH and to the theft of the car so as to exclude all liability on their part, the assumption of liability for proven negligence to be found in SCH's own conditions would take precedence: and that is so whether SCH and Lotus were in direct contractual relations or whether their relationship was merely that of a bailment or sub-bailment on terms.<sup>147</sup>

---

<sup>143</sup> Ibid 540 [44].

<sup>144</sup> Ibid 541 [48].

<sup>145</sup> *The Pioneer Container* [1994] 2 AC 324, 333 (Lord Goff).

<sup>146</sup> *The Rigoletto* [2000] 2 Lloyd's Rep 532, 542 [52] (Rix LJ).

<sup>147</sup> Ibid 542 [54] (Rix LJ).

Lord Justice Rix declared:

Lord Reid's fourfold test for the successful invocation of a direct contract between shipper and stevedore via a Himalaya clause contained in a contract of carriage between shipper and carrier is set out in *Midland Silicones v Scruttons* ... Forty years on, there now tends to be little difficulty in giving successful effect to that test.<sup>148</sup>

The Court also made a further point, namely that the bill of lading only contemplated protection for the carriage of goods. The bill of lading noted that 'the period before loading' for the purposes of clause 2, should be taken to mean (and be limited to) 'the period between the commencement of pre-loading operations (ie cargo checks and stowage arrangements on 30 August) and actual physical loading'.<sup>149</sup> The question was: when does it start? The Court argued that at best it began when the cars were shifted from the lock-up to the wharf; a time after, the car was stolen. In other words, the pre-loading arrangements stood on their own feet, that is, they are regulated by the contract between Lotus and SCH. In the end, SCH was not protected by the Himalaya clause.

*7 Homburg Houtimport BV v Agrosin Ltd*<sup>150</sup> ('the Starsin')<sup>151</sup>

*The Starsin* sailed to Europe with a parcel of cargo of timber. Due to negligent stowage, the timber deteriorated; the owner claimed damages against the ship owners and demise charterers of the *Starsin*. Lord Bingham put the issue simply as raising questions whether the shipowner is liable to the cargo owners under the bill of lading contracts and, if not, whether he is liable to any of the cargo owners (and if so) to what extent in tort.<sup>152</sup>

---

<sup>148</sup> Ibid 542 [57] (Rix LJ).

<sup>149</sup> Ibid 543 [66] (Rix LJ).

<sup>150</sup> [2004] 1 AC 715.

<sup>151</sup> [2004] 1 AC 715.

<sup>152</sup> Ibid 734 [1] (Lord Bingham).

The first contentious issue was whether the bill of lading was a shipowner's bill or charterer's bill. The issue was that the printed terms in the bill of lading did not correspond with the word chosen by the parties and were not written into the contract. The intention of the parties was given more weight than the printed words and the Court found that the Bills were charterer's bills which in essence assumes that Continental Pacific Shipping (CPS) is the contractual carrier.<sup>153</sup>

Once the parties to the contract were identified, the second issue was whether the terms of the contract protected the shipowner against liability to the cargo owners. Clause 5 was the relevant clause in question which read in the relevant parts as follows (including the mistakes noted below by the Court):

- (1) It is hereby expressly agreed that no servant or agent of the carrier (including any person who performs work on behalf of the vessel on which the goods are carried or of any of the other vessels of the carrier, their cargo, their passengers or their baggage, including towage of and assistance and repairs to the vessels and including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act neglect or default on his part while acting in the course of or in connection with his employment and,
- (2) without prejudice to the generality of the provisions in this bill of lading, every exemption limitation, condition and liberty herein contained and every right exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available to and shall extend to protect every such servant or agent of the carrier is or shall be deemed to be acting on behalf of and for the benefit of all persons who are or might be his servants or agents (including any person who performs work on behalf of the vessel on which the goods are carried or of any of the other vessels of the carrier, their cargo, their passengers or their baggage, including towage of and assistance and repairs to

---

<sup>153</sup> Ibid 736–38 [6]–[13] (Lord Bingham).

- the vessels and including every independent contractor from time to time employed by the carrier)
- (3) and all such persons shall to this extent be deemed to be parties to the contract contained in or evidenced by this bill of lading
  - (4) The shipper shall indemnify the carrier against any claim by third parties against whom the carrier cannot rely on these conditions, in as far as the carrier's liability would be excepted if said parties over bound by these conditions.<sup>154</sup>

The Court noted that the printing of this clause leaves something to be desired, as words and punctuations are missing, forcing the Court to insert words. The Court agreed with the submissions of counsel that the words which were missing are those found in the online bill of lading form, on which clause 5 had been closely modelled.<sup>155</sup> The Court proceeded to analyse each of the paragraphs of clause 5.

The clause in the first part on its face confers wide ranging immunity, which all members of the lower court agreed that it was a covenant not to sue, enforceable by injunction.<sup>156</sup> Lord Bingham disagreed with the Court of Appeal and found that ‘it is in my judgment impossible to spell a covenant not to sue out of the language of this clause’.<sup>157</sup> The second part of clause 5 filled the lacuna in *Adler v Dickson* and followed the solutions as noted in *Midland v Scruttons*, *the Eurymedon* and *the New York Star* as noted above. The third part of clause 5 raised the question whether the shipowner was an independent contractor who was confirmed by the Court.<sup>158</sup>

The next issue was whether the duties imposed by the Hague Rules, specifically art III rules 1 and 2, which notes that ‘subject to the provisions of art IV the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried’. Article III rule 8 provides that inter alia lessening liability otherwise

---

<sup>154</sup> Ibid 740 [20] (Lord Bingham).

<sup>155</sup> Ibid 741 [22] (Lord Bingham).

<sup>156</sup> Ibid 742 [24] (Lord Bingham).

<sup>157</sup> Ibid.

<sup>158</sup> Ibid 743 [29] (Lord Bingham).

than as provided in these rules, shall be null and void and of no effect:

The cargo owners contended that the rule limits the protection to the carrier which also includes the servants, agents and independent contractors, otherwise article III rule 8 would have no relevance.<sup>159</sup> The counter argument was that the definition of carrier in the Hague Rules includes ‘the owner or the charterer who enters into a contract of carriage with a shipper’ and that CPS and not the shipowner entered into a contract with the shipper, hence the liability of the shipowner should not be excluded.<sup>160</sup>

Lord Bingham disagreed with the counter argument. He noted:

The Himalaya clause itself, and the undoubted artificiality of the reasoning relied on to uphold it in [previous judgments] were a deft and commercially-inspired response to technical English rules of contract, particularly those governing Privity and consideration.<sup>161</sup>

As noted in *the Mahkutai*, the problem that there was no contract between carrier and stevedores was overcome ‘by holding, in effect, that a bilateral contract came into existence upon the performance by the stevedore’.<sup>162</sup>

Having noted the crucial issue, Lord Bingham observed that ‘the present case however is factually different, because the act performed to bring any contract into existence between the shipowner and the cargo owners is the carrying of the goods’.<sup>163</sup> This difference gave rise to a legal difference and taking the Hague Rules into consideration, the Court noted that it is a contract of carriage and the shipowner is entering it with the shipper. Hence art III rule 8 of the Hague Rules do not protect the shipowner by the exemption clause 5 and the shipowner therefore did not become subject to the positive

---

<sup>159</sup> Ibid 744 [33] (Lord Bingham).

<sup>160</sup> Ibid.

<sup>161</sup> Ibid 744 [34] (Lord Bingham).

<sup>162</sup> Ibid.

<sup>163</sup> Ibid.

obligations laid on to the carrier by art III r 1 and 2 of the Hague Rules.<sup>164</sup> That said, the issue therefore arises whether the cargo owners have a tort claim against the shipowner which was dismissed. Of interest is the dissenting judgment of Lord Steyn in relation to whether the shipowner was the carrier under the bill of lading. In Lord Steyn's view the issue was the inconsistency of provisions noted on the face of the bill and two clauses on the reverse side, which contradict the provisions on the face of the bill. He solved the issue by applying the reasonable person versed in the shipping trade test and stated:

I have no doubt that in any event he would, as between provisions on the face of the bill and those on the reverse side of the bill, give predominant effect to those on the face of the bill. Given the speed at which international trade is transacted, there is little time for examining the impact of barely legible printed conditions at the time of the issue of the bill of lading. In order to find out who the carrier is it makes business common sense for a shipper to turn to the face of the bill, and in particular to the signature box, rather than clauses at the bottom of column two of the reverse side of the bill.<sup>165</sup>

Lord Steyn also relied on the comments by Rix LJ who observed 'commercial certainty and indeed honesty is promoted by giving greater effect to the front of the bill of lading'.<sup>166</sup> He therefore concluded that it was a charterer's bill. In relation to the issue in tort he reached the same conclusion and allowed the appeal. The Court in the end noted that the shipowner's appeal ought to be allowed because greater weight should attach to terms specifically chosen by the parties than to standard printed conditions.<sup>167</sup>

---

<sup>164</sup> Ibid.

<sup>165</sup> Ibid 747 [45] (Lord Steyn).

<sup>166</sup> *Homburg Houtimport BV v Agrosin Private Ltd* [2001] 1 Lloyd's Rep 437, 451 (Rix LJ).

<sup>167</sup> *Homburg Houtimport BV v Agrosin Ltd* [2004] 1 AC 715, 715 (Lord Bingham, Lord Steyn, Lord Hoffmann, Lord Hobhouse and Lord Millett).

8 *Whitesea Shipping and Trading Corp & Anor v El Paso Rio Clara Ltd & Ors ('The Marielle Bolten')*<sup>168</sup>

This is an interesting case, as it not only involves a Himalaya clause but also an anti-suit injunction. The issue was that an exclusive jurisdiction clause was incorporated into one of the clauses in the bill of lading. The vessel grounded in the Dominican Republic. There were in all nineteen defendants (cargo interests covered by three bills of lading) and two claimants, namely the demise charterer and the owner of the vessel. There was no damage to the cargo which was offloaded in the Bahamas but for the rest, general average claims were made against the cargo owners. The defendants commenced proceedings in Brazil.

Each bill contained an English jurisdiction clause as well as that the bills must be governed by English law. The bill of lading also contained the following clauses:

## 1. DEFINITIONS

f. 'Subcontractor' includes stevedores, longshoremen, lighters, terminal operators, warehousemen, truckers, agents, servants, any person, firm, corporation or other legal entity who performs services incidental to the goods and/or the carriage of the goods, including direct and indirect subcontractors and their servants and agents.

## 3. SUBCONTRACTING

- a. The carrier shall be entitled to subcontract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by the carrier in relation to the goods.

---

<sup>168</sup> [2009] 2 CLC 596.

- b. [1] The merchant undertakes that no claims or allegations shall be made against any servant, agent, stevedore or subcontractor of the carrier which imposes or attempts to impose upon any of them or any vessel owned or chartered by any of them any liability whatsoever in connection with the goods,
- [2] and if such claim or allegation should nevertheless be made, to indemnify the carrier against all consequences thereof.
- [3] Without prejudice to the foregoing, every servant, agent, stevedore and subcontractor shall have the benefit of all provisions herein benefitting the carrier as if such provisions were expressly for their benefit, and all limitations of and exonerations from liability provided to the carrier by law and by the terms hereof shall be available to them, and in entering into this contract the carrier, to the extent of those provisions, does so not only on its own behalf, but also as agent and trustee for such servants, agents, stevedores and subcontractors.
- c. The defences and limits of liability provided for in this bill of lading shall apply in any action whether the action is founded in contract or in tort.<sup>169</sup>

Flaux J summarised the claimants' case as being straight forward, namely that all the defendants are covered by the Himalaya clause and pursuant to clause 3(b) are bound in equity that they will not sue the third parties. Furthermore, the defendants cannot commence proceedings in Brazil as it is in breach of the English jurisdiction clause.

The insurer defendants argued that clause 3(b) is in breach of art III rule 8<sup>170</sup> of the Hague Rules, that is:

---

<sup>169</sup> Ibid 601 [7] (Flaux J).

<sup>170</sup> Article III states:

‘Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in

The effect of entitling either the carrier under the bill of lading contract or the third party to enforce the covenant not to sue in the first part of clause 3b would be to confer blanket immunity upon the third party, which is contrary to Article III rule 8 of the Hague Rules to which the Himalaya contract is subject. Accordingly, the first part of clause 3b is null and void and of no effect. The argument relies heavily on the decisions in *The Starsin*.<sup>171</sup>

The Court compared the clauses contained in *The Starsin* and the present one and concluded that there were two principal distinctions between the clauses.

The first part of [*the Starsin*] clause does not in terms set out an undertaking or covenant not to sue and that the present clause does not contain a ‘deeming provision’ such as is contained in the third part of [*the Starsin*] clause in that case.<sup>172</sup>

Flaux J referred back to Coleman J in *the Starsin* and referred to them at length.

His conclusion was that ‘in my judgment, [the reasoning of the House of Lords] as to why, if the first part of the clause is a covenant not to sue (as it undoubtedly is in the present case), it insures only to the benefit of the contractual carrier and not third parties, remains compelling’.<sup>173</sup> Another point which required a solution was whether clause 3(b) was a contract of carriage within the meaning of art III rule 8.<sup>174</sup> To find an answer it requires an investigation as to the functions which the relevant third parties were actually performing. There was no doubt that all the third parties performed duties incidental to the actual carriage of goods. Flaux noted:

---

the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.’

<sup>171</sup> *Whitesea Shipping and Trading Corp & Anor v El Paso Rio Clara Ltd & Ors* [2009] 2 CLC 596, 605 [23] (Flaux J).

<sup>172</sup> *Ibid* 606 [27] (Flaux J).

<sup>173</sup> *Ibid* 609 [30] (Flaux J).

<sup>174</sup> *Ibid*.

Once it is seen that none of the third parties undertook the sea carriage or was in fact the carrier within the meaning of the Hague Rules (unlike the owners in *the Starsin*), the conclusion that the enforcement of the covenant not to sue is not contrary to Article III rule 8 is clearly correct.<sup>175</sup>

In the end the Court stated ‘that the claimants have shown a sufficient practical interest, which is more than merely academic, in obtaining an injunction to restrain the insurer defendants from breaching the covenant not to sue’.<sup>176</sup>

### B Conclusion

There is nothing new in the endeavour by contractual parties to limit their liabilities through exemption clauses. Since the 19<sup>th</sup> century exemption clauses were subject to a strict Privity rule; only parties to a contract could rely on the protection of the clause. However, during the 20<sup>th</sup> century a slow change has taken place where the Privity rule has been modified to take account in maritime adventures of commercial expectation. The benefits of the terms of the contract were made available to all those who are involved in the carriage of goods but are not parties to the contract expressed either in the bill of lading or charter party.

Two issues came to the fore: first, claiming protection under the contractual clause and secondly, protection under the principle of bailment on terms. *Elder Dempster* dealt with the issue of bailment of terms and concluded that the exceptions and limitations of liability stipulated in the bill of lading protected the stevedores. This decision was much maligned and criticised. *Midland v Scruttons* reverted back to the Privity rule. Further, in *Wilson v Darling Island Stevedoring and Lighterage Co Ltd*<sup>177</sup> Fullagar J noted that ‘[*Elder Dempster* exhibits] a curious and seemingly irresistible anxiety to save grossly negligent people from the normal consequences of their

---

<sup>175</sup> Ibid 615 [52] (Flaux J).

<sup>176</sup> Ibid 618 [65] (Flaux J).

<sup>177</sup> (1956) 95 CLR 43.

negligence'.<sup>178</sup> *Elder Dempster* was either referred to or followed or, until 1985, subject to derogatory remarks such as those by Donaldson J in *Johnson Matthey & Co Ltd v Constantine Terminals Ltd*,<sup>179</sup> where he noted that *Elder Dempster* was 'something of a judicial nightmare'<sup>180</sup> and Ackner LJ in *The Forum Craftsman*<sup>181</sup> that the decision was 'heavily comatose, if not long-interred'.<sup>182</sup>

These comments obviously proved to be wrong, as without doubt, *Elder Dempster* can be regarded as the 'legal spring' in the development of the Himalaya clause. *Midland v Scruttons* as noted above showed how the Privity rule can be overcome. Of great significance were the decisions in *The Eurymedon* in 1975 and by *the New York Star* in 1981, which established the realisation that commercial reality dictates that the Privity rule is outdated and does not correspond to business practices in the shipping industry.

The *Mahkutai* firmly established that the Privity rule is no longer applicable but fell short of establishing a fully fleshed exception to it. It is now left to courts to interpret the exemption clauses in order to elicit the exact meaning and hence to what extent non contractual parties are protected by the Himalaya clause. This has been confirmed in the latest significant case, *The Starsin*.

However, a second issue has also been discussed in connection with the embedding of a circular indemnity clause within the Himalaya clause. The circular indemnity clause, which indemnifies the carrier against all consequences of breaking its undertaking not to sue such third parties, has been upheld in *The Elbe Maru*.<sup>183</sup> It was further tested in *The Starsin* and *The Marielle Bolten*. The argument has been that the covenant not to sue runs contrary to art III rule 8. However, as noted *The Marielle Bolten* none of the third parties undertook the

---

<sup>178</sup> Ibid 71 (Fullagar J).

<sup>179</sup> [1976] 2 Lloyd's Rep 215.

<sup>180</sup> Ibid 219 (Donaldson J).

<sup>181</sup> [1985] 1 Lloyd's Rep 291.

<sup>182</sup> Ibid 295 (Ackner LJ, Browne-Wilkinson LJ and Sir John Megaw).

<sup>183</sup> [1978] 1 Lloyd's Rep 206.

sea carriage or was in fact the carrier within the meaning of the Hague Rules.

## V THE AUSTRALIAN JURISPRUDENCE

### *A Overview*

Australia, being a common law country, also prescribed to the privity rule. However, a similar if somewhat different development took place. In the end the Himalaya clause as developed in England took root and is finally entrenched in the Australian legal landscape. This section will trace the Australian development. The Australian jurisprudence is of significance insofar as the privity rule was maintained longer than in the English context. Furthermore, even jurisprudence, which was decided after *the Mahkutai*, still persisted in relying on earlier case law. Of interest is that the Australian decision of *New York Star* has been noted as an English development because the Australian High Court decision was overturned on appeal to the Privy Council. The dissenting view has been noted in Part IV.

Of interest is the fact that *Midland v Scruttons* features in most of the Australian jurisprudence despite the fact that it preceded *Adler v Dickson*. The four criteria as set out by Lord Reid did not only prove to be the essential argument in the introduction of the Himalaya clause in *Adler v Dickson* but also in the Australian development of the Himalaya clause. Australia ratified the Hague-Visby Rules - s 11 of COGSA states that:

- (1) All parties to:
  - (a) a sea carriage document relating to the carriage of goods from any place in Australia to any place outside Australia; ... are taken to have intended to contract according to the laws in force at the place of shipment.

Therefore, an agreement to the contrary has no effect. It follows that shipments originating in Australia are governed by Australian law and any clauses to the contrary are void as s 11 is a mandatory law.

Glimpses of protecting third parties to a contract can be observed in *Water Trading Co Ltd v Dalgety & Co Ltd*<sup>184</sup> and *Gilbert Stokes & Kerr Pty Ltd v Dalgety & Co Ltd*<sup>185</sup> but these cases were subsequently overruled by the High Court and hence did not create any lasting precedent.

1 *Wilson v Darling Island Stevedoring & Lighterage Co Ltd*<sup>186</sup>

The High Court, on appeal from the Supreme Court of New South Wales, dismissed the appeal by the stevedores as they were not a party to the contract evidenced by the bill of lading. Therefore, the stevedores could not be sued or sue under the contract and hence they had no protection from the tortious act of its servants.<sup>187</sup> The decision of the Supreme Court was reversed.

The Court in their decision discussed *Elder Dempster* and the appellant's counsel also referred to *Adler v Dickson*.<sup>188</sup> The plaintiff imported textiles from France to be transported to Sydney. The goods were off-loaded and handed over to a stevedoring firm. An employee handled a crane negligently and ruptured a water pipe; the result being that the textile was damaged beyond any use. Clause 1 provided that:

The carrier's has no responsibility whatsoever for the goods ... subsequent to the discharge from the vessel. Goods in the custody of the carrier or his agents or servants before loading and after discharge whether being forwarded to or from the vessel or whether awaiting shipment, landed or stored ... are in such custody at the sole risk of the owners of the goods and the carrier shall not be liable for loss or damage arising or resulting from any cause whatsoever.<sup>189</sup>

---

<sup>184</sup> (1951) 52 SR (NSW) 4.

<sup>185</sup> (1948) 48 SR (NSW) 435.

<sup>186</sup> (1956) 95 CLR 43.

<sup>187</sup> *Ibid* 43 (Dixon CJ, Williams, Fullagar, Kitto and Taylor JJ).

<sup>188</sup> [1955] 1 QB 158.

<sup>189</sup> *Wilson v Darling Island Stevedoring & Lighterage Co Ltd* (1956) 95 CLR 43, 43 (Dixon CJ, Williams, Fullagar, Kitto and Taylor JJ).

Two questions were asked; first, is the defendant entitled to the benefit of any protection or immunities afforded under the bill of lading as set out in clause 1? Secondly, if so does the bill of lading afford the defendant a valid defence to the claim of the plaintiff? The Court noted that the proceedings were entered with the sole purpose of testing the decision in *Water Trading Co Ltd v Dalgety & Co Ltd*.<sup>190</sup> In *Water Trading Co and Gilbert Stokes & Kerr Pty Ltd v Dalgety & Co Ltd*<sup>191</sup> the Court extended that doctrine of immunity to the case of stevedores.<sup>192</sup> Both cases were overruled in *Wilson v Darling Island*.<sup>193</sup>

Williams J in his dissenting judgment referred to *Elder Dempster* in a lengthy discussion as being an example, where the Privity rule was not followed as the Court argued that under certain circumstances, a person not being a party to a contract might take advantage of clauses in the bill of lading. His Honour came to the conclusion that:

The contract prescribes the conditions upon which the goods are placed in the possession of the carrier in order that he may perform the contract of carriage, that it is obvious that in order that he may perform that contract the carrier must employ servants, agents or independent contractors to carry out part of his duties, and that the true intent of the contract is that all persons engaged by the carrier to perform it should participate in the performance on the same bases as the carrier himself.<sup>194</sup>

Arguably, the views of Williams J have been influenced by the decision in *Elder Dempster* and appear to foreshadow the future development of the Himalaya clause. His Honour, relying mainly on clause 1, argued that the contract would only be completely performed by the delivery of the goods or by the defendant taking a step which the parties had agreed. Therefore, the clause was still operative and the defendant was protected.

---

<sup>190</sup> (1951) 52 SR (NSW) 4.

<sup>191</sup> (1948) 48 SR (NSW) 435.

<sup>192</sup> *Wilson v Darling Island Stevedoring* (1956) 95 CLR 43, 45 (Dixon CJ, Williams, Fullagar, Kitto and Taylor JJ).

<sup>193</sup> *Ibid.*

<sup>194</sup> *Ibid* 60 (Williams J).

Fullagar J stated his majority judgment by indication that the defendant is prima facie liable for damages to the plaintiff.<sup>195</sup> A plain reading of clause 1 suggests that the defendant is not a party to the contract and hence cannot take advantage of the exemption clause referring back to *Tweddle*. His Honour referred briefly to *Adler v Dickson* where the view was expressed that in some cases there is the possibility that with little difficulty the inference can be made that a third party can take advantage of an exemption clause. Moving on to *Elder Dempster* his Honour noted:

A conceivable ground of the decision in the *Elder Dempster Case* is that the master of the ship, although for many purposes the servant of the owners, took possession of the goods not on behalf of the owners but on behalf of the charterers. On this view the owners would not be responsible for the negligent stowing and they would have no need to rely on the exception clause in the bill of lading.<sup>196</sup>

Fullager J agreed with the views of Lord Sumner and noted that the ratio decidendi in *Elder Dempster* is:

In the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading.<sup>197</sup>

Referring back to what Denning LJ had to say in *Adler v Dickson*, Fullager J agreed that a distinction needs to be drawn; if A stipulates with B that he will not be liable for the actions of his servants or agents, his servants and agents are not protected, but if A stipulates with B that neither he nor his servants or agents are not liable his servants and agents are protected.<sup>198</sup> It is interesting to note that his Honour commented on the burgeoning development of the Himalaya

---

<sup>195</sup> Ibid 66 (Fullager J).

<sup>196</sup> Ibid 68 (Fullager J).

<sup>197</sup> Ibid 69 (Fullager J).

<sup>198</sup> Ibid 70 (Fullager J).

clause. First he correctly stated that here is a conspicuous lack of unanimity as to what the real principle in *Elder Dempster* really is. He agreed that the principle had been extended to give the stevedores exemptions from liability by virtue of the bill of lading to which the stevedore is not a party and this is a development of the common law which is out of character and the opposite one would feel to be justified.<sup>199</sup>

He continued to comment that:

We seem to discern ... a curious, and seemingly irresistible, anxiety to save grossly negligent people from the normal consequences of their negligence – an anxiety which refuses to be balked even by so well-established a general doctrine as that of *Tweedle v Atkinson*.<sup>200</sup>

Fullagar J however agreed with Jenkins LJ's views expressed in *Adler v Dickson* and that nobody yet has succeeded in satisfactorily formulating any new principles.

He in effect suggested that *Elder Dempster* has nothing whatsoever to do with the current case and stated:

The stevedore is a complete stranger to the contract of carriage, and it is no concern of his whether there is a bill of lading or not, or, if there is, what are its terms. He is engaged by the shipowner and by nobody else, and the terms on which he handles the goods are to be found in his contract with the shipowner and nowhere else. The shipowner has no authority whatever to bind the shipper or consignee of cargo by contract with the stevedore, and there is, in my opinion, no principle of law—deducible from the *Elder Dempster* Case or from any other case—which compels the inference of any contract between the shipper or consignee and the stevedore. If the stevedore negligently soaks cargo with water and ruins it, I can find neither rule of law nor contract to save him from the normal consequences of his tort.<sup>201</sup>

---

<sup>199</sup> Ibid.

<sup>200</sup> Ibid 71 (Fullagar J).

<sup>201</sup> Ibid 79 (Fullagar J).

Kitto J and Taylor J in substance made similar arguments in allowing the appeal.

### B Commentary

The conclusion which can be drawn is, given at the time where *Adler v Dickson*<sup>202</sup> has just been decided, that the effects of change have been noted by the High Court. However, the majority rejected the ratio in *Elder Dempster* and gave the exemption clause its natural meaning by drawing also on *Adler v Dickson*. Arguably this case is a watershed in the development of exemption clauses in Australia.

However something needs to be said in relation to *Water Trading Co Ltd v Dalgety & Co Ltd*<sup>203</sup> which was overruled. The facts of the two cases are very similar. The issue was the application of the principle as stated in *Elder Dempster*. The Court came to the conclusion that:

Until delivery of the goods to the consignee, the contract evidenced by the bill of lading remained in force; and (2) that, until such delivery, the stevedoring contractor was, either as agent or bailee, entitled to the same protection under the bill of lading as was given to the shipping company, its servants and agents for the purpose of carrying out the contract.<sup>204</sup>

Clause 3 was in the following terms:

The responsibility of the carrier shall commence only when the tackle of the carrier's ship is hooked on to the cargo for loading and cease absolutely when such tackle is unhooked in the process of discharging. Goods in the custody of the carrier or his servants before loading and after discharge whether being forwarded to or from the ship or whether awaiting shipment, landed, or stored, or put in to hulk or craft belonging to the carrier or not, or pending transhipment at any stage of the whole transport are in such custody at the sole risk of the shipper and

---

<sup>202</sup> [1955] 1 QB 158.

<sup>203</sup> (1951) 52 SR (NSW) 4.

<sup>204</sup> *Ibid* 4 (Street CJ, Owen and Herron JJ).

the carrier shall not be liable for loss or damage arising or resulting from any cause whatsoever.<sup>205</sup>

The difference between the two cases could arguably be the definition in clause 1(b) which notes that ‘shipper’ included the ‘consignee’.<sup>206</sup> However Street CJ stated that:

To suggest that the consignee was expected to take delivery on the wharf as the tackle was unhooked is absurd ... It was obviously contemplated by the parties that the goods have to be removed and stored for a period before being delivered, and during that period the contract was still on foot and bound the parties with the same efficacy as it did when the goods were on the ship at sea.<sup>207</sup>

Owens J dismissed the argument of the defence that the stevedored was not an agent of the carrier and hence was not entitled to the benefits of the exemption. He noted:

I am by no means convinced that, even if the defendant was not an ‘agent’ of the carrier within the definition clause, it would necessarily follow that, at the relevant time, there was, to use Lord Sumner’s words (1): ‘any such bald bailment with unrestricted liability, or such tortious handling entirely independent of contract, as would be necessary to support’ the plaintiff’s claim’.<sup>208</sup> He held that the goods were not delivered “according to the exigency of the bills of lading by being placed in the hands of the landing agents, and it may be admitted that bills of lading cannot be said to be spent or exhausted until the goods covered by them are placed under the absolute dominion and control of the consignees.”<sup>209</sup>

---

<sup>205</sup> Ibid 5 (Street CJ, Owen and Herron JJ).

<sup>206</sup> Ibid.

<sup>207</sup> Ibid 6–7 (Street CJ, Owen and Herron JJ).

<sup>208</sup> Ibid 9 (Street CJ, Owen and Herron JJ).

<sup>209</sup> Ibid 11 (Street CJ, Owen and Herron JJ).

Viewing the decisions through the rear vision mirror it is clear that, as noted elsewhere, *Elder Dempster* was confusing and left courts to find a ratio which was different.

1 *BHP v Hapag-Lloyd Aktiengesellschaft*<sup>210</sup> ('*BHP v Hapag-Lloyd*')

BHP, as the shipper and consignee, contracted with the carrier to transport a grinding machine from Hamburg to Newcastle. This involved carriage by sea and land. In Sydney a transport company, agents of the carrier, transported the machine to Newcastle. It was damaged en-route as a result of negligence, but not amounting to recklessness.

Clause 4 read as follows:

**SUB-CONTRACTING AND INDEMNITY:**

- (1) The Carrier shall be entitled to sub-contract on any terms the whole or any part of the Carriage.
- (2) The Merchant undertakes that no claim or allegation shall be made against any person whomsoever by whom the Carriage or any part of the Carriage is performed or undertaken (other than the Carrier) which imposes or attempts to impose upon any such person or any vessel owned by any such person any liability whatsoever in connection with the Goods whether or not arising out of negligence on the part of such person and if any such claim or allegation should nevertheless be made to indemnify the Carrier against all consequences thereof. Without prejudice to the foregoing every such person shall have the benefit of all provisions herein benefiting the Carrier and if such provisions were expressly for his benefit; and in entering into this contract, the Carrier, to the extent of these provisions, does so not

---

<sup>210</sup> [1980] 2 NSWLR 572.

only on his own behalf but also as agent and trustee for such persons.

Clause 5 read as follows:

‘Carrier’s Responsibility,’ in so far as it dealt with combined transport, provided that, in a case where loss or damage to the cargo did not result from an act or omission of the carrier done with intent to cause damage wilfully or recklessly, compensation for loss or damage ‘shall in no circumstances whatsoever and howsoever arising exceed \$US 2.50 per kilo of the gross weight of the goods lost or damaged.’<sup>211</sup>

Justice Yeldham consulted many authorities in regard to the authority of the Court to grant injunctions and noted that the Court did have discretion to exercise that right, specifically when dealing with a negative covenant. The Court noted that the case is a commercial contract entered into by large commercial corporations, hence it was argued that:

Plainly, as the plaintiff would know, rates of carriage and other commercial considerations between the carrier and companies such as the second defendants would be affected and influenced by the latter’s knowledge of the presence in the bill of lading of a clause which purported to protect them from liability to consignors or consignees of cargo.<sup>212</sup> ... I see no reason why the plaintiff should not be held to its contractual undertaking, and every reason why it should comply with it. Commercial considerations involving each party to this action render it just that an undertaking not to claim, as set out in cl 4(2) of the bill of lading, should, prima facie, be enforced.<sup>213</sup>

Justice Yeldham referred to *the Elbe Maru* in his decision to grant the application.

---

<sup>211</sup> Ibid 575–6 (Yeldham J).

<sup>212</sup> Ibid 583 (Yeldham J).

<sup>213</sup> Ibid.

2 *Sydney Cooke Ltd v Hapag-Lloyd Aktiengesellschaft*<sup>214</sup>

This case again was presided over by Yeldham J. The facts are sufficiently identical to *Broken Hill Proprietary Co Ltd v Hapag-Lloyd Aktiengesellschaft*.<sup>215</sup> This case involved a printing machine which was damaged by stevedores. Not surprisingly the same clauses as in the *BHP* case also applied here.

Yeldman J came to the same conclusion and stated:

In my opinion, the orders sought by the first defendant should be made for reasons similar to those which I expressed in my earlier decision to which I have adverted. No discretionary defences, other than the one to which I earlier referred, were raised. I order that the plaintiff's action against the second defendant be permanently stayed.<sup>216</sup>

3 *Godina v Patrick Operations Pty Ltd*<sup>217</sup>

The stevedores had been the carrier's agent for ten years. In this instance they had negligently allowed the plaintiff's goods to be damaged. The Supreme Court of New South Wales relied on *The New York Star* and applied the Himalaya clause against the plaintiff, despite the fact that there was a paucity of evidence on the relationship between the carriers and the stevedores. The bill of lading contained the following clauses:

Clause 4(2)

The Merchant undertakes that no claim or allegation shall be made against any servant, agent or subcontractor of the Carrier which imposes or attempts to impose upon any of them or any vessel owned by any of them any liability whatsoever in connection with the Goods, and, if any such claim or allegation should nevertheless be made, to

---

<sup>214</sup> [1980] 2 NSWLR 587.

<sup>215</sup> *Ibid.*

<sup>216</sup> *Ibid* 586 (Yeldham J).

<sup>217</sup> [1984] 1 Lloyd's Rep 333.

indemnify the Carrier against all consequences thereof. Without prejudice to the forgoing, every such servant, agent and sub-contractor shall have the benefit of all provisions were expressly for their benefit; and, in entering into this contract, the carrier, to the extent of those provisions, does so not only on its own behalf but also as agent and trustee for such servants, agents and sub-contractors.

Clause 5(c)(2)(b)

All liability whatsoever of the carrier shall in any event cease unless suit is brought within eleven months after delivery of Goods or the date when the Goods should have been delivered.

Justice Hutley noted that the proceeding would fail if the stevedore can avail himself of the clause. The appellant argued that the delivery of the carrier was when the goods were unloaded, hence the exemption clause ends at that point as well. However, Hutley J followed the decision in *The New York Star* and noted that ‘it is quite clear that mere delivery to the wharf does not mean that this contract is exhausted and the immunities with it ... It is only if there has been delivery to the consignee that this happens’.<sup>218</sup> The Court in essence, felt that the Himalaya clause was already an established law and hence an established system of doing business in which the stevedores have authorised the carrier to obtain immunity on their behalf.<sup>219</sup>

Justice Hutley specifically noted:

As a matter of commercial practice, we are here concerned with an established system of doing business in which it can be taken, unless, I would have thought, the contrary is shown, both carriers and stevedores have fitted themselves in a manner by which an attempt will be made to confer immunity upon the stevedores in the bill of lading, and it can be taken that stevedores have authorized the carriers to endeavour to obtain immunity on their behalf.<sup>220</sup>

---

<sup>218</sup> Ibid 335 (Hutley J).

<sup>219</sup> Ibid.

<sup>220</sup> Ibid 355 (Hutley J).

Furthermore the presentation of the bill of lading which contained the exemption clauses to the stevedores, who was expected to act upon its presentation, was in the opinion of the Court, a ratification of the clauses by the consignee.<sup>221</sup>

4 *Darlington Futures Ltd v Delco Australia Proprietary Limited*<sup>222</sup>  
(‘*Darling Futures v Delco*’)

This case is of importance in relation to exemption clauses despite the fact that does not relate to a shipping contract. The facts relate to a broker client relationship, where the broker entered into unauthorised dealings resulting in losses for the client. The crucial question was ‘whether clause 6 protects the appellant from the consequences of what otherwise would be breaches of contract’.<sup>223</sup> The two clauses in question stated:

- 6 The Client ... acknowledges that the Agent will not be responsible for any loss should the Client follow any of the Agent's trading recommendations or suggestions, nor for any loss, in the case of Discretionary Accounts, arising from trading by the Agent on behalf of the Client. The Client finally acknowledges that the Agent will not be responsible for any loss arising in any way out of any trading activity undertaken on behalf of the Client whether pursuant to this Agreement or not.
- 7(c) Any liability on the Agent's part or on the part of its servants or agents for damages for or in respect of any claim arising out of or in connection with the relationship established by this agreement or any conduct under it or any orders or instructions given to the Agent by the Client, other than any liability which is totally excluded by paragraphs (a) and (h) hereof, shall not in any event (and whether or not such liability results from or involves negligence) exceed one hundred dollars.<sup>224</sup>

---

<sup>221</sup> Ibid 336 (Hutley, Samuels and Mahoney JJ).

<sup>222</sup> (1986) 161 CLR 500.

<sup>223</sup> Ibid 507 (Mason, Wilson, Brennan, Deane and Dawson JJ).

<sup>224</sup> Ibid 500–1 (Mason, Wilson, Brennan, Deane and Dawson JJ).

The Court examined case law on the issue of interpretation of exception clauses including *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd*.<sup>225</sup> The conclusion was that:

These decisions clearly establish that the interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause *contra proferentem* in case of ambiguity ... the same principle applies to the construction of limitation clauses.<sup>226</sup>

The Court in the end read clause 7 as limiting the liability of the brokerage firm considering the important words 'claims arising out of or in connexion with the relationship established by the agreement'.<sup>227</sup> This is so, as even an unauthorised transaction has a connection to the relationship and hence 'a limitation clause may be so severe in its operation as to make its effect virtually indistinguishable from that of an exclusion clause'.<sup>228</sup> Despite the fact that this case is not dealing with a Himalaya clause it nevertheless is instructive, as it gives guidance as to the interpretation of exemption clauses and the Himalaya clauses are in effect nothing more than an exemption clause.

*6 Nissho Iwai Australia Ltd v Malaysian International Shipping Corporation, Berhad*<sup>229</sup>

Three years later a further case within the discussion of exemption clauses, where a stevedore was involved again without referring directly to Himalaya clauses was decided. The facts are simple; 'a goods container was stolen shortly after it had been discharged from a ship and placed in a stack at a terminal in Sydney... The container

---

<sup>225</sup> [1981] 1 WLR 138.

<sup>226</sup> *Darlington Futures Ltd v Delco Australia Proprietary Limited* (1986) 161 CLR 500, 510 (Mason, Wilson, Brennan, Deane and Dawson JJ).

<sup>227</sup> *Ibid* 511 (Mason, Wilson, Brennan, Deane and Dawson JJ).

<sup>228</sup> *Ibid* 510 (Mason, Wilson, Brennan, Deane and Dawson JJ).

<sup>229</sup> (1989) 167 CLR 219.

had been placed in the stack by a stevedoring firm engaged by the carrier'.<sup>230</sup> The Court referred to *Darlington Futures v Delco* in interpreting the relevant exemption clause. The relevant parts of clause 8 stated:

- 8(2) Under no circumstances shall the Carrier be liable or responsible in any capacity for or in respect of
- (a) Any loss or damage to or in connection with Goods which arises or is due to any occurrence before such goods are received by or on behalf of the Carrier at the place of receipt or after such Goods have been delivered or made available by or on behalf of the Carrier at the place of delivery.
  - (d) Any loss or damage to or in connection with Goods arising or resulting at any time from fire not caused by the actual fault or privity of the Carrier, .... or any cause or event which the Carrier could not avoid or the consequences of which the Carrier could not prevent by the exercise of reasonable diligence.
3. The Carrier shall not under any circumstances be liable or responsible in any capacity for or in respect of any non-delivery or mis-delivery of Goods, delay, or loss or damage of any kind which arises out of or in connection with the carriage covered by this bill of lading or anything done or not done by the Carrier or any Carrier's employee to or in respect of Goods...<sup>231</sup>

The carriage was also covered under the Hague Rules and the Court noted that cl 8(2) in effect is identical to art IV paragraph 2(b)-(q) of the Hague Rules.<sup>232</sup> In interpreting clause 8 the Court took note of *Darlington Futures v Delco*, by stating that a clause must be construed according to its natural and ordinary meaning.

---

<sup>230</sup> Ibid 219 (Mason CJ, Brennan, Deane, Gaudron and McHugh JJ).

<sup>231</sup> Ibid 220 (Mason CJ, Brennan, Deane, Gaudron and McHugh JJ).

<sup>232</sup> Ibid 226 (Mason CJ, Brennan, Deane, Gaudron and McHugh JJ).

The Court consequently read the clauses in context and argued that the wording ‘loss or damage to or in connection with Goods’ in clause 8(2)(d) should be read ‘as covering “loss caused by loss of goods”’.<sup>233</sup> The obvious conclusion in interpreting cl 8(2) is that it exempted the carrier from loss or damage resulting from non-delivery of the goods. The Court in an obiter noted that the decision was based on clause 8(2)(d) and it was unnecessary to look also to clause 8(2)(a).

*5 Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd*<sup>234</sup>

In this case the Court did not refer to the seminal British cases at all, except *The New York Star*, but not the appeal which was heard in the Privy Council. This case is symptomatic of the Australian jurisprudence. The facts are simple: goods were stolen from the terminal in broad daylight before the consignee could take delivery. It was found that the employees of the terminal operator were involved in the theft of 830 cases of Scottish Whisky. The relevant clauses read as follows:

Clause 3(2)

A Himalaya clause in the traditional sense noted that the exemptions were extended to any ‘servant, agent or sub-contractor of the carrier’ by whom the carriage or any part of it was undertaken.

Clause 4

The carrier shall not in any circumstances whatsoever be liable for any loss of or damage to the goods howsoever caused occurring ... after they were discharged at the oceans vessel's rail at the port of discharge.

Clause 8(3)

The exemptions limitations terms and conditions in this bill of lading shall apply whether or not loss or

---

<sup>233</sup> Ibid 229 (Mason CJ, Brennan, Deane, Gaudron and McHugh JJ).  
<sup>234</sup> (1993) 40 NSWLR 206.

damage is caused by negligence or actions constituting fundamental breach of contract.<sup>235</sup>

Clause 4 alone would not have protected the terminal operator specifically in view of the obligations also contained in the bill of lading that the carriage would be subject to the provisions of the carrier's applicable tariff, which were deemed to be incorporated. Clause 5.3.2.1 of the tariff provided, so far as relevant:

The Container/Goods will be released if the bill of lading and/or delivery/sub-delivery order is accompanied by a copy of the relevant Customs Entry endorsed by the Australian Customs Authority showing full description of the Goods.<sup>236</sup>

Allowing the delivery which took place without a presentation of a bill of lading was prima facie a breach of cl 5.3.2.1 and a conversion for which the carrier and the terminal operator were legally responsible.<sup>237</sup> However, taking cl 8(3) and 3(2) into consideration, both the carrier and subcontractors were protected from breaching cl 5.3.2.1.

Handley JA carefully noted:

[Cl 5.3.2.1] would impose no effective legal obligation on the carrier and would not form part of the contract or at best would be an illusory promise. This result and the corresponding immunities of the carrier and its subcontractors are so startling that it is necessary to examine the legal reasoning leading to such results with the greatest care.<sup>238</sup>

The starting point was considered to be *Darlington Futures v Delco* and *Nissho Iwai Australia Ltd v Malaysian International Shipping Corporation, Berhad*.<sup>239</sup> The Court relied on *Darlington Futures v Delco*. Interestingly, this case did not refer to any of the leading

---

<sup>235</sup> Ibid 207 (Handley JA, Sheller JA and Cripps JA).

<sup>236</sup> Ibid 210 (Handley JA).

<sup>237</sup> Ibid.

<sup>238</sup> Ibid.

<sup>239</sup> (1989) 167 CLR 219.

English cases, relying instead on the domestic construction of exemption clauses. Arguably therefore the Court did not view a Himalaya clause as requiring different interpretation than any other exemption clause, whether contained in a shipping case or any other actual issues such as futures trading or parking issues.

The Court, quoting *Darlington Futures v Delco*, noted that:

The interpretation of an exclusion clause is to be determined... according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and where appropriate, construing the clause *contra proferentem* in case of ambiguity.<sup>240</sup>

The Court in *Nissho Iwai v Malaysian International*, referring to *Darlington Futures v Delco*, dealing with a similar issue of non-delivery, stated that the interpretation and hence meaning of the clause ‘ultimately depends on its language, read in context, and not on any *a priori* notion that the non-delivery of goods was not intended to be protected’.<sup>241</sup> The Court at this stage noted that jurisprudence in relation to the interpretation of exemption clauses in general needed to be consulted. In effect, the court treated the Himalaya clause as part of the general law of exemption clauses and not in a class of its own. The Court looked at *Sydney City Council v West*,<sup>242</sup> where a parking ticket stated ‘the Council does not accept any responsibility for the loss (of) or damage to any vehicle... however such loss, damage... may arise or be caused’.<sup>243</sup>

The ticket also noted that it needed to be presented on leaving. A thief drove the vehicle out of the parking lot without presenting the ticket. The Court found that the clause did not protect the City council by

---

<sup>240</sup> Ibid 215 (Handley JA).

<sup>241</sup> *Nissho Iwai Australia Ltd v Malaysian International Shipping Corporation, Berhad* (1989) 167 CLR 219, 227 (Mason CJ, Brennan, Deane, Gaudron and McHugh JJ).

<sup>242</sup> (1965) 114 CLR 481.

<sup>243</sup> *Glebe Island v Continental Seagram* (1993) 40 NSWLR 206, 211 (Handley JA).

stating that ‘in the absence of express words or necessary intendment, it would be going too far to construe the clause as excusing loss by mis-delivery or delivery to an unauthorised person’.<sup>244</sup> This statement of construction was supported by Lord Denning in the decision of the Privy Council in *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd*.<sup>245</sup> The Court, after consulting several other judgments, firmly returned to the view as expressed in *Darlington Futures v Delco* as noted above.<sup>246</sup>

Sheller JA in his judgment stated, after considering the exemption clauses and relying on *Darlington Futures v Delco* that:

The determination of whether or not a carrier or bailee is dealing with the goods in a way that can be regarded as in intended performance of his contractual obligation or in a way that is quite alien to his contract, and of whether, having concluded that the latter is the appropriate categorisation, even so the language of the exemption clause, read naturally, will extend to it, may present great difficulty.<sup>247</sup>

The point Sheller JA was making is that the words in the relevant clause must convey a particular event or intended performance. If the intended performance includes the actual claim, as in this case a delivery to a thief, the question is whether the words used in the Himalaya clause includes the actual event. He contrasted *Sydney City Council* with *Nissho Iwai v Malaysian International*. In *Nissho Iwai v Malaysian International* the Court stated that cl 8(2) was wide enough to protect the subcontractor:

It is difficult to understand, therefore, why the parties would have intended that the carrier's exemption from liability should be confined to partial loss of or damage to goods. ... In the circumstances of this case, the main object of the contract

---

<sup>244</sup> *Sydney City Council v West* (1965) 114 CLR 481, 490 (Barwick CJ and Taylor J).

<sup>245</sup> (1959) AC 576.

<sup>246</sup> *Darlington Futures Ltd v Delco Australia Proprietary Limited* (1986) 161 CLR 500, 510 (Mason, Wilson, Brennan, Deane and Dawson JJ).

<sup>247</sup> *Glebe Island v Continental Seagram* (1993) 40 NSWLR 206, 232 (Sheller JA).

provides no ground for concluding that non-delivery of the goods was outside the protection of cl 8(2).<sup>248</sup>

In *Sydney City Council* the point was made that the clause contained an important part:

[It is] implied from this provision which was pleaded, in the statement of claim, as an undertaking that the said motor car could not and would not be obtained or removed from the parking station without presentation of the parking check at the office and the obtaining in exchange therefor of a delivery ticket.<sup>249</sup>

Sheller JA, taking the above judgments into consideration, posed three questions:

1. Did the bill of lading with the incorporated tariff expressly or by implication impose upon the carrier a duty only to deliver in exchange for the bill of lading?
2. Was there a delivery of the containers and if so was it unauthorised in the sense that a person for whom the carrier, or Glebe Island, or both, were responsible permitted the goods to be handed over to a person who did not produce a bill of lading?
3. If the answer to these questions is yes, and accordingly there was a breach of the special undertaking, can the exemption be construed as extending to a breach of this special undertaking?<sup>250</sup>

As far as the first question is concerned, the important point is whether the goods have been delivered or not. It is well established that if a carrier delivers goods without a bill of lading which is negotiable he must suffer the consequences. Simply put, to do so

---

<sup>248</sup> *Nissho Iwai Australia Ltd v Malaysian International Shipping Corporation, Berhad* (1989) 167 CLR 219, 223 (Mason CJ, Brennan, Deane, Gaudron and McHugh JJ).

<sup>249</sup> *Sydney City Council v West* (1965) 114 CLR 481, 653 (Windeyer J).

<sup>250</sup> *Glebe Island v Continental Seagram* (1993) 40 NSWLR 206, 237 (Sheller JA).

deliberately is prima facie conversion of the goods; to do so negligently is a breach of contract.<sup>251</sup> In the absence of an exemption clause the Court would need to conclude that Continental is authorised to sue for conversion. Sheller JA concluded that the terms specifically in clauses 8(3) and 4 are wide enough to protect ABC.<sup>252</sup> Continental also attempted to sue Glebe Island and the question is whether Glebe Island could take advantage of the exemption clause.

As noted above, the issue was at what time were the goods delivered? The Court took the position that the goods were stolen before they could be delivered pursuant to the clauses in the bill of lading, stating:

It is unreal to suggest that Glebe Island was employed other than to perform or undertake part of ‘the carriage’ which is defined as meaning ‘the whole of the operations and services undertaken by the carrier in respect of the goods.’ In my opinion Glebe Island was clearly entitled to rely upon the exemption clauses and accordingly the claim of Continental against it also failed.<sup>253</sup>

In the end the Court came to the conclusion that ‘the terminal operator was entitled by operation of clause 3(2) to rely on the exemption clauses as it was sub-contracted to undertake part of the carriage, which at the time of the theft was still on foot as the obligation to deliver to the consignee remained unperformed’.<sup>254</sup>

6 *Chapman Marine Pty Ltd v Wilhelmsen Lines A/S*<sup>255</sup> (*‘Chapman Marine v Wilhelmsen’*)

The plaintiff bought a cruiser from Wellcraft International in Texas. The cruiser had to be shipped to Sydney and was delivered by the seller to the first defendant- the carrier. When the cruiser arrived in Sydney, in a state which amounted to a constructive total loss, the claimant sued the carrier as well as the stevedore. The carriage was

---

<sup>251</sup> *Glebe Island v Continental Seagram* (1993) 40 NSWLR 206, 238 (Sheller JA).

<sup>252</sup> *Ibid* 240 (Sheller JA).

<sup>253</sup> *Ibid* 241 (Sheller JA).

<sup>254</sup> *Ibid* 207 (Handley JA, Sheller JA and Cripps JA).

<sup>255</sup> [1999] FCA 178.

regulated by the *Carriage of Goods by Sea Act 1936* (US) ('COGSA'). The carrier relied on the limitation provision within COGSA. There was also a dispute as to the position of the cruiser; the shipper argued that the cruiser should have been stowed below deck whereas the carrier argued that the bill of lading contained an express provision permitting stowage of a 'yacht' on deck.

The stevedore also argued that they could rely on the limitation clause as the bill of lading contained a Himalaya clause which read as follows:

6(c) ... every such person by whom the whole or any part of this contract is performed or undertaken, including but not limited to underlying carriers, stevedores, terminal operators, subcontractors and independent contractors shall have the benefit of every exemption, limitation, condition and liberty herein contained and of every right exemption from liability, defence and immunity of whatsoever nature applicable to [Wilhelmsen].<sup>256</sup>

Furthermore, the carrier sought to restrain the shipper from suing the stevedores as the bill of lading contained the following circular indemnity clause:

6(b) ... no claim or allegation shall be made against any person other than [Wilhelmsen] (whomsoever by whom the Carriage or any part of the Carriage was performed or undertaken) which claim imposes or attempts to impose upon any such person...any liability whatsoever in connection with the goods or the Carriage of the Goods, whether or not arising out of negligence on the part of such person.<sup>257</sup>

Alternatively, Wilhelmsen relied on the following provision:

6(e) The Merchant further undertakes that no claim or allegation in respect of Goods shall be made against [Wilhelmsen] by any person other than in accordance with the terms and conditions of this bill of lading which imposes or attempts to impose upon

---

<sup>256</sup> Ibid 178 [28] (Emmet J).

<sup>257</sup> Ibid 178 [29] (Emmet J).

[Wilhelmsen] any liability whatsoever in connection with the Goods or the carrying of Goods... and if any such claim or allegation should nevertheless be made to indemnify [Wilhelmsen] against all consequences thereof.<sup>258</sup>

Emmett J considered that the carrier was in breach of s 3(2) of COGSA which ensured that they would ‘properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried’. The employee of the carrier warned the stevedores that they needed to be careful in relation to the unloading of containers near the cruiser. However, the fact that the cruiser was damaged by the stevedores’ negligence was proven.

In essence, it was held that the sum of damages which can be claimed was subject to the interpretation of the Himalaya clause. Accordingly, there were two issues which needed to be resolved; if the stevedores were persons who undertook the whole or any part of the contract would they be protected by the Himalaya clause. The stevedore obviously was not undertaking the whole of the carriage. If the stevedore only performs a part of the carriage the shipper is in breach of its undertaking contained in clause 6(b) of the bill of lading in making and prosecuting its claim against the stevedores. Further, in that case, the shipper would also be in breach of its undertaking given in clause 6(e) that no person would make a claim or allegation which imposes or attempts to impose upon the carrier any liability in connection with the carrying of the Cruiser.<sup>259</sup>

The shipper also argued that the terms contained in the Himalaya clause were in breach of s 3(8) of COGSA which reads as follows:

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be

---

<sup>258</sup> Ibid.

<sup>259</sup> Ibid 178 [50] (Emmett J).

deemed to be a clause relieving the carrier from liability. 46 US Code Appendix 1303.<sup>260</sup>

However, Emmett J ruled that this issue was resolved in *Sydney Cooke Ltd v Hapag-Lloyd Aktiengesellschaft*,<sup>261</sup> where Yeldham J held that the subcontractor was not a carrier for the purpose of COGSA. He also held that a grant of stay was warranted by relying on *Broken Hill Proprietary Co Ltd v Hapag-Lloyd Aktiengesellschaft*.<sup>262</sup> In order to prevent a circuit of action pursuant to clause 6(e), the Court relied on *the Elbe Maru*.

Justice Emmet significantly reiterated that:

It is commercially unrealistic to expect that, in the international carriage of goods by sea, a carrier will itself perform all of the activities concerned with the carriage. It could not be suggested that a consignor or merchant would enter into a contract of carriage with such an expectation. Rather, the scheme of cl6 of the bill of lading is clearly to ensure that all subcontractors are treated as being under the single umbrella of the carrier. Its commercial object is clear, and in my view, should be given effect.<sup>263</sup>

The result was that the claim was stayed and that the shipper could only claim \$US500 pursuant to package limitations.

*7 Toll (FGCT) Pty Limited v Alphapharm Pty Limited*<sup>264</sup> (*'Toll v Alphapharm'*)

This case is not directly relevant to shipping contracts however it sheds light on the relationship between agent and principle. The relevant clause read:

---

<sup>260</sup> Ibid 178 [62] (Emmet J).

<sup>261</sup> [1980] 2 NSWLR 587, 594–95 (Yeldham J).

<sup>262</sup> Ibid 581–83 (Yeldham J).

<sup>263</sup> *Chapman Marine Pty Ltd v Wilhelmsen Lines A/S* [1999] FCA 178 [67] (Emmet J).

<sup>264</sup> [2004] 219 CLR 167.

## Clause 6

Notwithstanding any other clause of this Contract . . . under no circumstances shall the Carrier be responsible to the Customer for any injurious act or default of the Carrier, nor, in any event, shall the Carrier be held responsible for any loss, injury or damage suffered by the Customer either in respect of:

- (a) the theft, mis-delivery, delay in delivery, loss, damage or destruction, by whatever cause, of any goods being carried or stored on behalf of the Customer by the Carrier at any time (and regardless of whether there has been any deviation from any agreed or customary route of carriage or place of storage)
- (b) any consequential loss of profit, revenue, business, contracts or anticipated savings; or
- (c) any other indirect consequential or special loss, injury or damage of any nature and whether in contract, tort (including without limitation, negligence or breach of statutory duty) or otherwise.

In this clause ... 'Customer' includes the Customer's Associates.<sup>265</sup>

The Court looked for assistance to similar issues as found in shipping contracts, particularly in Himalaya clauses and precedents. The important passage in relation to the application of the Himalaya clause read as follows:

---

<sup>265</sup> Ibid 174 [20] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

In the case of a stevedore seeking the benefit of a Himalaya clause, courts have been ready to conclude that the carrier was acting with the stevedore's authority.<sup>266</sup>

The Court found that the respondent, Alphapharm Pty Ltd, was bound by clause 6 and hence the appellant was exempt from liability against Alphapharm's claim.

### *C New Zealand judgment*

For the sake of completeness, one New Zealand judgment is added to this discussion of Australian development. Despite the fact that all exports have to be carried by sea, most contracts dealing with New Zealand shipping are not governed by New Zealand law and therefore there is a shortage of New Zealand judgments.

#### *1 Air New Zealand Ltd v The Ship*<sup>267</sup> ('*Contship America*')

Containers of goods were washed overboard while in transit from Europe to New Zealand. The plaintiff argued that the defendants were bailees and or, alternatively, that they had acted negligently. The Court relied on the leading English and Australian cases in relation to Himalaya clauses; the issue being whether the arbitration clause binding the shipowner was valid.

Greig J noted the principle as expressed by Lord Wilberforce in *Air New Zealand v The Ship* as being a general proposition that a contract between two parties cannot be sued upon by a person even though the contract is expressed to be for their benefit.<sup>268</sup> He went on to state:

There is however, the possibility in any particular case that a stranger may have the benefit of exemptions and limitations and presumably other provisions in a contract if that is to give effect to the clear intentions of a commercial document. The way in which that can be done is in accordance with the requisites set out by Lord Reid in his speech in *Midland Silicones* which was

---

<sup>266</sup> Ibid 193 [79] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

<sup>267</sup> [1992] 1 NZLR 425.

<sup>268</sup> Ibid 433 [25]–[30] (Greig J).

expressly approved by the majority in the *New Zealand Shipping case* and applied to the stevedores there.<sup>269</sup>

The Court examined the four pre-requisites as set out by Lord Reid and came to the conclusion that a carrier is defined exclusively and does not extend to shipowner and furthermore, s 20 does not suggest that the carrier was acting as agent on behalf of anybody else.<sup>270</sup> Additionally, s 21, which is similar to a Himalaya clause, again does not name the shipowner as falling under the protection and hence the benefits are not extended beyond the parties to the contract. Hence, the Court found that:

There was no particular exception in a contract for carriage by sea, available for all persons including stevedores and other independent contractors, from the fundamental that third parties are not entitled to the benefit of a contract.<sup>271</sup>

The claim of the defendant therefore failed.<sup>272</sup>

#### D Commentary

The Australian *Carriage of Goods by Sea Act 1991* (Cth) has only partially resolved the issue of exemption clauses through s 4(2) which states:

If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention these rules.

A limitation on the protection has been placed in art 4(4):

Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this Article, if it is

---

<sup>269</sup> Ibid 437–38 [30]–[35] (Greig J).

<sup>270</sup> Ibid 437 [50] (Greig J).

<sup>271</sup> Ibid.

<sup>272</sup> Ibid.

proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.<sup>273</sup>

The problem still remains; how can an independent contractor be sued or alternatively be protected from being sued? It must be remembered that the independent contractor in essence is one of the companies within the supply chain which has no direct contractual relationship with the consignee. In effect the Himalaya clause is still of importance as far as any independent contractors are concerned, as well as servants or agents as art 4(4) restricts their cover under the COGSA. What can be said is that the Australian case law indicates that the judiciary did not refer extensively to English jurisprudence, but attempted to find their own solutions to the application and interpretation of exemption clauses.

## VI THE UNITED STATES JURISPRUDENCE

### *A Overview*

The US' development is not dissimilar to that of England, with the exception that the initial changes to the Privity rule are earlier than the ones in England. The evolution of the Himalaya clause in the US will be discussed below. In order to understand the US development, jurisprudence prior to 1959 needs to be considered. As early as 1859 in *Lawrence v Fox*,<sup>274</sup> the US judiciary rejected *Tweddle*, finding in favour of the position that contractual terms can benefit a third party despite the lack of consideration. The crucial point is that a clear intention to do so has to be expressed in the contract. Unlike anywhere else, the question of party intention has been noted in the *Restatement (Second) Contracts* (1981), s 302 states:

1. Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either;

---

<sup>273</sup> *Carriage of Goods by Sea Act 1991* (Cth) s 4(4).

<sup>274</sup> (1859) 20 NY 268 (NYCA).

- a. the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
  - b. the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
2. An incidental beneficiary is a beneficiary who is not an intended beneficiary.

It must be noted that s 302 is not based on the UCC but on the common law.

Early American judgments extended bill of lading exceptions even where the bill of lading clauses in question were far from specific. Thus in *National Federation of Coffee Growers of Columbia v Isbrandtsen Co*<sup>275</sup> (*'National Federation v Isbrandtsen'*) the limitation period was extended to the defendant without much analysis. The Court accepted that the plaintiff was an agent of the carrier, relying on *Collins & Co v Panama R Co*<sup>276</sup> (*'Collins v Panama'*).

### B Post 1959 Development

A change in how the courts dealt with exemption clauses occurred in 1959 with the decision of the Federal Court in *Herd & Co v Krawill Machinery Corp*<sup>277</sup> (*'Herd v Krawill Corp'*). This case proved to be the turning point in the United States development of the Himalaya clause.

#### 1 *Herd v Krawill Corp*

The petitioner in this case was an independent stevedoring company who was orally engaged by the carrier to load the cargo on board of the vessel. Through their negligence, they dropped a machine causing

---

<sup>275</sup> *National Federation of Coffee Growers of Columbia v Isbrandtsen Co*, 17 Misc 2d 113, 185 NYS 2d 392.

<sup>276</sup> *Collins & Co v Panama R Co* 5 Cir 197 F.2d 839.

<sup>277</sup> 359 US 297 (1959).

extensive damage. They denied the allegations of negligence and also contended that they were covered by the terms of the bill of lading and the limitations of liability provisions in the *COGSA* limiting the liability to \$500.

The relevant exemption clause in section 30 and 37 of the bill of lading provided:

In consideration of a choice of freight rates having been offered to the shipper by the Carrier, it is agreed that in case of loss of, or damage to... goods of an actual value exceeding \$500... per package... the value of such goods, shall be deemed to be \$500 per package... and the Carrier's liability, if any, shall be determined on the basis of a value of \$500 per package... unless the nature of such goods and a value higher than \$500 per package... shall have been declared in writing by the shipper upon delivery to the Carrier and noted on the face hereof and unless payment of the extra freight charge incident thereto shall have been made or promised... in which case such declared value, or the actual value if less, shall be the basis for computing damages and any partial loss or damage shall be adjusted pro rata.

The Court held that the stevedores were not protected by the *COGSA* nor the aforementioned clause in the bill of lading. The Stevedores first contended that both the provisions of the bill of lading and the *COGSA* should be construed to limit its' liability a well as that of the carrier. Secondly, if only the carrier is protected it is also protected by the majority decision in *A M Collins & Co v Panama R Co*<sup>278</sup> (*'A M Collins v Panama'*).

As to the first contention, the Court looked at the relevant provisions of the *COGSA*, specifically ss 1300 to 1315, as well as the limiting provisions in the bill of landing. The Court found that the Act 'says that "neither the carrier nor the ship" shall be liable for more than \$500 per package- it makes no reference whatever to stevedores or

---

<sup>278</sup> 197 F 2d 893.

agents'.<sup>279</sup> The Court came to the same conclusion when looking at the exemption clause in the bill of lading.

As to the second contention, the Court turned its attention to the majority decision in *A M Collins v Panama*. The premise of the court was that 'all agents of the carrier who perform any part of the work undertaken by the carrier in the contract of carriage, evidenced by the bill of lading, are, by reason of that fact alone, protected by the provisions of the contract limiting the liability of the carrier, though such agents are not parties to nor express beneficiaries of the contract'.<sup>280</sup> The Court quoted the majority view which said:

A stevedore so unloading, in every practical sense, does so by virtue of the bill of lading and, though not strictly speaking a party thereto, is, while liable as an agent for its own negligence, at the same time entitled to claim the limitation of liability provided by the bill of lading to the furtherance of the terms of which its operations are directed.<sup>281</sup>

The Court disagreed with that conclusion and noted that 'an agent "is responsible for his own act, to the full extent of the injury (caused thereby)"'.<sup>282</sup> The Court specifically rejected the notion that simply because the agent is performing some part of the work undertaken, usually by the carrier, he is therefore protected to the same extent as the carrier. Of importance is also the Supreme Court's statement that 'contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries'.<sup>283</sup>

The Court consulted not only US jurisprudence but also referred to *Elder Dempster* and Australian jurisprudence including *Wilson v*

---

<sup>279</sup> *Herd & Co v Krawill Machinery Corp*, 359 US 297; 79 SC 766 (1959) 769 (Whittaker J).

<sup>280</sup> *Ibid* 770 (Whittaker J).

<sup>281</sup> *A M Collins & Co v Panama R Co* 197 F 2d 893, 896 (Holmes, Russel and Rives Circuit Judges).

<sup>282</sup> *Herd & Co v Krawill Machinery Corp*, 359 US 297; 79 SC 766 (1959) 770 (Whittaker J).

<sup>283</sup> *Ibid* 771 (Whittaker J).

*Darling Island* noting that '[no] English case ever held that a bill of lading that expressly limits the liability of only the carrier nevertheless applies to and limits the liability of its negligent agent'.<sup>284</sup>

2 *Taisho Marine & Fire Insurance Co Ltd v Vessel Gladiolus*<sup>285</sup>  
(*'Taisho Marine v Vessel Gladiolus'*)

In this case, the insurance company sued the trucking company for damages as a result of damage caused to the goods on the inland route. The goods were delivered from Japan to Los Angeles on the vessel *Gladiolus*. The carrier included a Himalaya clause into the bill of lading which provided in the relevant parts:

[A]ll servants, agents and independent contractors (including in particular, but not by way of limitation, any stevedores) used or employed by the Carrier for the purpose of or in connection with the performance of any of the Carrier's obligations under this Bill of Lading, shall, in consideration of their agreeing to be so used or employed, have the benefit of all rights, defences, exceptions from or limitations of liability and immunities of whatsoever nature referred to or incorporated herein applicable to the Carrier as to which the Carrier is entitled hereunder...<sup>286</sup>

At issue was the one year statute of limitation as set by s 3(6) of the COGSA which was expressly incorporated into Sanko's bill of lading. If the freight company fell within this clause they would be protected by the limitation period otherwise, they were obliged to cover the losses. The District Court, as well as the Federal Circuit Court, agreed that the freight company was protected.

The Court stated that a Himalaya clause should be strictly construed and limited to intended beneficiaries, relying on *Herd v Krawill Corp.* The Court further held that when a party is not specifically mentioned in the Himalaya clause, 'the party should, at a minimum, be included in a well-defined class of readily identifiable persons to which

---

<sup>284</sup> Ibid 772 (Whittaker J).

<sup>285</sup> 762 F 2nd 1364 (1985).

<sup>286</sup> Ibid 1366 (Kennedy, Circuit Judge).

COGSA benefits are extended under the terms of the clause'.<sup>287</sup> The Court noted that in *Toyomenka Inc v SS Tosaharu Maru*<sup>288</sup> a stevedore hired an independent contractor to guard the cargo on the pier. The clause was held only to apply to:

All servants, agents and independent contractors (including in particular, but not by way of limitation, any stevedores) used or employed by the Carrier for the purpose of or in connection with the performance of any of the Carrier's obligations under this Bill of Lading...<sup>289</sup>

The clause was inapplicable to the independent contractor because he was hired by the stevedore rather than by the carrier. The same arguments applied in this case as the freight company, performing a non-maritime function, was hired by the consignee and hence was not a party to the Himalaya clause, since the carrier's obligations had ended after discharging the goods. The proper test as to whether a party can benefit from a Himalaya clause considers 'the nature of the services performed compared to the carrier's responsibility under the carriage contract'.<sup>290</sup>

### 3 *Institute of London Underwriters v Sea-Land Services Inc.*<sup>291</sup>

A yacht was damaged while being unloaded from a cargo ship. The question was whether the carrier and the stevedore were protected by the limitation per package of \$500, pursuant to the *COGSA*. The first question as posed by Goodwin CJ was:

To decide these issues, we must consider a question that has not previously found a definitive answer in this circuit: In a contract for foreign carriage that incorporates the *Carriage of Goods by Sea Act* (COGSA ... but to which COGSA does not apply *ex proprio vigore*, what is the effect of otherwise valid contract terms inconsistent with COGSA? We hold that in such a

---

<sup>287</sup> Ibid 1367 (Kennedy, Circuit Judge).

<sup>288</sup> 523 F 2d 518 (1975).

<sup>289</sup> Ibid 521 [7] (Timbers, Circuit Judge).

<sup>290</sup> *Taisho Marine & Fire Insurance Co Ltd v Vessel Gladiolus* 762 F 2nd 1364 (1985) 1367 (Kennedy, Circuit Judge).

<sup>291</sup> 881 F 2d 761 (1989).

contract, COGSA has the effect of a contractual term only, and inconsistent terms may therefore be given force.<sup>292</sup>

As the yacht was carried on deck, the COGSA did not apply as s 1301(c) states “‘goods’ [excludes]... cargo which by the contract of carriage is stated as being carried on deck and is so carried’.”<sup>293</sup> However, the clause paramount to the bill of lading stated that ‘the defences and limitations of said Act shall apply to goods whether carried on or under deck’.<sup>294</sup> The Court held that ‘terms inconsistent with COGSA, but which are otherwise valid contract terms, may be given force where the COGSA is incorporated into a contract for foreign carriage to which it would not apply *ex proprio vigore*’.<sup>295</sup>

The Court turned its attention to the Himalaya clause which reads (emphasis added):

If it shall be adjudged that *any person other than the owner or demise charterer* (including the master, time charterer, agents, *stevedores*, lashers, watchmen and other *independent contractors* ) is the carrier or bailee of the goods, or is otherwise liable in contract or in tort, all rights, exemptions, and limitations of liability ... shall be available to such other persons.<sup>296</sup>

The Court found that the clause was not ambiguous and extended the limitation of liability under the COGSA to the stevedores.

#### 4 *Caterpillar Overseas SA v Marine Transport Inc.*<sup>297</sup>

The shipper sued a trucking company for damage to the cargo. The incident took place while the goods were transferred overland by a trucker employed by the carrier from the port of delivery to another port in the same vicinity. The defendants were the terminal operators,

---

<sup>292</sup> Ibid 763 (Goodwin CJ).

<sup>293</sup> Ibid 764 (Goodwin CJ).

<sup>294</sup> Ibid.

<sup>295</sup> Ibid 766 (Goodwin CJ).

<sup>296</sup> Ibid 767 (Goodwin CJ).

<sup>297</sup> 900 F 2d 714 (1990).

the carrier and the trucking company. The Court decided that the terminal operator was free of negligence but not the carrier (Farrell) or the trucking company (Marine Transport Inc). The carrier was protected by the package limitation provision under the COGSA but the trucking company was not. The Court also refused to include loss of profit into the actual damages awarded to the plaintiff.

The plaintiffs engaged Lusk Shipping Company as its agent and freight forwarder. However, the carrier encountered a problem as its original vessel was not available and the potential substitute vessel was in the adjacent port; such transfers were not unusual. The carrier was responsible for arranging the transfer and hence employed the defendant as an independent contractor. Farrell supplied the flat rack container and chassis. The driver questioned whether this arrangement was safe and having been told it was, he proceeded with the transport. Due to the delivery of the wrong flat rack and chassis, the tractor slid off the truck and was damaged.

As the bill of lading was never intended to apply to activities connected with the transportation by an independent trucker over public highways from one port to another, neither the carrier nor the trucking company were protected. The Court noted that:

Marine was hired and paid for by Farrell to transport the flatrack for NIT. Farrell did not select the route of travel and did not control Marine's driver. Negligence of Marine was a proximate cause of the accident and damages. Neither the shipper nor the freight forwarder had notice that Farrell would contract with Marine to haul the goods to NIT, or how it would be loaded.<sup>298</sup>

In essence this case was decided on the facts and the Himalaya clause merely gave protection to the carrier in relation to the package limitation under the COGSA.

*5 Lucky Goldstar v. S. S. California Mercury*<sup>299</sup>

---

<sup>298</sup> Ibid 718 (Russel, Circuit Judge).

<sup>299</sup> 750 F Supp 141 (1991).

A shipper sought to recover damages to goods caused by a rail carrier while the goods were in transit. Before the shipment left Korea on its way to Seattle two bills of lading were issued. The first was issued by Haniel to Lucky's office in Korea as the shipper and the New Jersey office as the consignee. The second bill was issued by Uni-International Co as the shipper on behalf of Lucky and Haniel's New York office as the consignee. While being transported by the second rail-company (Conrail), the goods were damaged. The argument was that Conrail, the rail operator, was not entitled to the package limitation clause because the bill of lading clauses only applied during marine transport.

The first question was whether the COGSA protection extends directly to Conrail. The Court noted that s 1301(d) of the COGSA only applies to 'carriers' and 'ships'. As Conrail was neither the shipper nor the carrier it cannot be directly entitled to the COGSA protection.<sup>300</sup> The second question was whether Conrail was protected under the bills of lading, specifically clause 5, which states:

The carrier shall be entitled to sub-contract on any terms the whole or any part of the handling, storage or carriage of the Goods... [E]very such servant, agent and subcontractor shall have the benefit of all provisions herein for the benefit of the Carrier as if such provisions were expressly for their benefit.<sup>301</sup>

The Court quoted *Herd v Krawill Corp* with reference to the required standard when reviewing bills of lading:

Contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they 'are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties.'<sup>302</sup>

---

<sup>300</sup> Ibid 144 [3]–[4] (Leisure, District Judge).

<sup>301</sup> Ibid.

<sup>302</sup> *Herd & Co v Krawill Machinery Corp* 359 US 297; 79 SC 766 (1959) 771 (Whittaker J).

The Court found that the language in clause 5 was not sufficiently clear to protect Conrail as international shipping involves ‘dealing in a field where recognition of technical precision of language has been the benchmark’.<sup>303</sup> The Court further noted that ‘the absence of the phrase “inland carriers” in cl 5 is particularly significant, considering the fact that the term is used elsewhere in the bill of lading’.<sup>304</sup> That Court hence dismissed Conrail’s claim for protection either under the COGSA or the Himalaya clause.

6 *Mikingberg v Baltic SS Co*<sup>305</sup> (*‘Mikingberg v Baltic SS Co’*)

Here, goods were shipped from Russia to the United States and while in the custody of the stevedores, the goods were handed wrongly to a thief. The plaintiff was asked to wait while the investigation was on foot before lodging a claim. Due to this reason, the one year limitation period provided by the COGSA expired. The first issue was therefore whether the plaintiff could bring their action, given the effluxion of time. The second issue was whether the stevedore was an agent and hence could claim the protection under the COGSA of the carrier within the meaning of the Himalaya clause which states:

Every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect ... [every] servant or agent of the Carrier (including every independent contractor)... employed by the Carrier.<sup>306</sup>

The Court noted that unless there is a contractual relationship between the carrier and the stevedores, and not just the fact that the stevedores handled cargo shipped by the carrier, the stevedore cannot be protected by the COGSA. The Court declined to ‘extend COGSA protections through the Himalaya clause to indefinite and

---

<sup>303</sup> *Lucky Goldstar v. S. S. California Mercury* 750 F Supp 141 (1991) 145 (Leisure, District Judge).

<sup>304</sup> *Ibid.*

<sup>305</sup> 988 F 2d 327 (1993).

<sup>306</sup> *Ibid* 332 (Altimari, Circuit Judge).

unforeseeable defendants who may have only an attenuated connection to the carriage of goods by sea'.<sup>307</sup>

*7 Mori Seiki USA Inc v MV Alligator Triumph*<sup>308</sup>

In this case, a lathe was damaged while unloading but before it was released from the port. The plaintiff sued the carrier, the ship, the charterer, the seaport operator and the stevedore firm which unloaded and subsequently damaged the lathe. The Court held that the carrier's bill of lading extended the \$500 protection to all participants in the maritime venture.

The bill of lading notes in the relevant parts:

[W]ith respect to loss or damage occurring during the period from the time when the Goods arrived at the sea terminal at the port of loading to the time when they left the sea terminal at the port of discharge ... [the carrier shall be responsible for such loss or damage] to the extent prescribed by the applicable Hague Rules Legislation.<sup>309</sup>

The plain reading suggests that the limitation period only extends to the time while the goods are in port, that is, until they are released. Hence, the Hague Rules were applicable and the damage was limited to \$500. Of importance in this case was the question of whether the limitation of damages extends to all participants, and especially to the stevedore. The clause reads in the relevant parts:

The Carrier shall be entitled to sub-contract on any terms the whole or any part of the handling, storage or carriage of the Goods and any and all duties whatsoever undertaken by the Carrier in relation to the Goods... [E]very such servant, agent and subcontractor shall have the benefit of all provisions herein for the benefit of the Carrier as if such provisions were expressly for their benefit.<sup>310</sup>

---

<sup>307</sup> Ibid 333 (Altimari, Circuit Judge).

<sup>308</sup> 990 F 2d 444 (1993).

<sup>309</sup> Ibid 446 (Hug, Circuit Judge).

<sup>310</sup> Ibid 450 (Hug, Circuit Judge).

The plaintiff suggested that the Terminal operator was not covered under the Himalaya clause as they were a subcontractor of the seaport operator. The Court referred to their decision in *Taisho Marine v Vessel Gladiolus* stating:

Whether an entity is an intended beneficiary of a Himalaya Clause depends upon the contractual relation between the party seeking protection and the ocean carrier, as well as the nature of the services performed compared to the carrier's responsibilities under the carriage contract.<sup>311</sup>

The lower court resolved the issue by arguing that the seaport operator was an agent for Mitsui, the carrier, when hiring the stevedores. The reliance of the Federal Court was placed on the *Restatement (Second) of Agency* which has been adopted in maritime law as an accurate statement of applicable general agency principles and provides that 'agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act'.<sup>312</sup> The conclusion was that the stevedores were included in the \$500 package liability limitation.

#### *8 Insurance Company of North America v M/V Savannah*<sup>313</sup>

A stevedore, while moving crates containing parts of an electric motor, damaged it in transit to the warehouse. The insurance company paid the owner \$605,000 and subsequently sued the stevedores for damages. The question was whether the stevedores were covered by the limitation provisions in the Hague-Visby Rules.

The Himalaya clause stated in the pertinent parts that:

If it shall be adjudged that any other is the Carrier, all defenses, including all limitations of and exonerations from liability,

---

<sup>311</sup> Ibid.

<sup>312</sup> American Law Institute, *Restatement (Second) of Agency* (1958) § 1(1).

<sup>313</sup> 94 Civ. 8846, 1998 A.M.C. 1029 (SD. NY 1997).

provided to the Carrier by law or by this Bill of Lading shall be available to such other... All defenses under this Bill of Lading shall inure also to the benefit of the Carrier's agents, servants and employees and of any independent contractor, including stevedores, performing any of the Carrier's obligations with respect to the goods or acting as bailee of the goods.

The Court referred to *Mikinberg v Baltic SS Co* noting that there must be a contractual relationship between the carrier and the stevedore for the Himalaya clause to apply. The plaintiff argued that the language of the bill of lading only extended to defences of the stevedore who were performing any of the carrier's obligations. Therefore, the clause did not apply. In the end the Court correctly noted:

While it is true that ambiguities must be construed against the carrier, the bill of lading in the present case is not ambiguous. Bills of lading, like all contracts, must be enforced by the courts in order to protect the rights of carriers and shippers to contract freely and according to their preferences. The terms agreed upon by Ivaran and General Electric are not to be set aside based on ambiguities manufactured by plaintiff.<sup>314</sup>

The Court accordingly limited the liability of the stevedores to \$500 per package.

9 *Komori America Corporation v Howland Hook Container Terminal Inc*<sup>315</sup>

The bill of lading in this case covered services performed up until the time when delivery of the cargo was made. The consignee's custom broker asked Terminal to load the cargo onto a truck. Howland billed the consignee for its services, namely a fee for ocean carriage, a separate bill for destination delivery and a separate fee for container freight station receiving charges.<sup>316</sup>

---

<sup>314</sup> Ibid 1035 (Rives, Circuit Judge).

<sup>315</sup> 97-Civ. 7243 1998 AMC 289 (SD. NY 1998) (John S. Martin, Jr., DJ).

<sup>316</sup> Ibid 2895.

American World Cargo (AWC) acted as customs agent for Komori and arranged for Howland to load the containers onto a truck sent by the plaintiff. The defendant dropped the cargo while loading and caused considerable damage. The point of contention was whether the bill of lading stopped applying before or after Howland loaded the cargo onto the truck and whether Howland acted as a servant, agent or subcontractor of the carrier.<sup>317</sup> Howland argued that they were covered by the carriers package limitation contained in the bill of lading.

The Court determined two questions. First, it considered ‘whether the bill of lading governs the loading of the crates onto the truck at all?... this question depends upon when “delivery” occurred, because the bill of lading states that Mitsui’s obligations continue until “delivery”’.<sup>318</sup> The second question was whether Howland could seek protection under the bill of lading. The Court stated that:

[E]ven if the bill of lading governs because delivery had not yet occurred when the crates were dropped, Howland Hook may only claim its protection if Howland Hook was acting as Mitsui’s servant, agent, or subcontractor when it dropped the crates.<sup>319</sup>

The conduct of the parties was crucial in determining these two questions, specifically because Komori entered into a separate contract with Howland to load the cargo onto the truck. However, Howland had a contract with the carrier to unload containers from its ship and strip the cargo from those containers. The Court noted that ‘Komori paid a separate fee for “delivery” and another for ‘container freight station’... that stands in marked contrast to its payment of money directly to Howland for the loading of the truck’.<sup>320</sup> The Court’s conclusion was that Howland did not act as a servant, agent, or subcontractor of the carrier when it loaded the truck. The clauses in the bill of lading therefore ceased to apply. The Court proceeded to

---

<sup>317</sup> Ibid 2896.

<sup>318</sup> Ibid 2897.

<sup>319</sup> Ibid.

<sup>320</sup> Ibid 2898.

explain the differences of container freight station and pier-to-pier from house-to-house shipments.

The process commences when the shipper hands the cargo to a container freight station, where that cargo is loaded into containers at the port of loading; a process known as ‘stuffing’. At the destination port the container is unloaded and brought to another container freight station, where the cargo is removed from the container; a process known as ‘stripping’. A bill of lading containing a container freight station term next to the port of loading or destination means that the carrier ‘stuffs’ or conversely ‘strips’ the cargo. This task usually is contracted out to a stevedoring firm.<sup>321</sup> The designation ‘pier-to-pier’ also means that the carrier ‘stuffs’ and ‘strips’ the shipper’s cargo into and from containers, while on the other hand the term ‘house-to-house’ means that the shipper ‘stuffs’ its cargo into containers itself, the carrier picks up the entire container and ships it all the way to the consignee, who in turn ‘strips’ the cargo from the container.<sup>322</sup>

The conclusion is that, depending on the specific terms, different parties are tasked to perform the ‘stuffing’ or ‘stripping’ however loading onto a truck is not part of the carrier’s duty. The Court also distinguished between handling and loading the goods onto the truck as well as who actually charges the shipper for the task. Due to the fact that Howland charged an extra amount of money for loading the cargo onto the truck, it went beyond the requirement under the container freight station term and ‘hence the liability limitations contained in the bill of lading and in the defendant’s tariff have no application in this case’.<sup>323</sup> The decision as to whether there was a breach of contract or bailment duties and the measure of damages were reserved to be decided later.

10 *Acciai Speciali Terni USA Inc v M/V Berane*<sup>324</sup>

---

<sup>321</sup> Ibid 2898–99.

<sup>322</sup> Ibid 2899.

<sup>323</sup> Ibid 2901.

<sup>324</sup> 181 F Supp 2d 458 (D. Md, 2002).

The plaintiff engaged the carrier to transport steel sheets from Italy to Baltimore. The sheets of steel were damaged by the offloading stevedore, Transcom. Clause 3, relating to forum selection, provided that any disputes arising under the bill of lading must be decided in the country where the carrier has their principle place of business. Clause 18 the Himalaya clause provided:

It is hereby expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the [consignee and owner of the cargo] for any loss, damage or delay arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, but without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors) and all such persons shall to this extent be or be deemed to be parties to the contract evidenced by this Bill of Lading.<sup>325</sup>

The Court noted that the forum selection clauses and the choice of law provisions are basically valid unless enforcing them would be ‘unreasonable under the circumstances’.<sup>326</sup> As the plaintiff has not shown any cause to indicate that ‘enforcement would be unreasonable, the Court [found that] the choice of forum and law clauses [were] valid and enforceable against AST’.<sup>327</sup> The next issue was whether the stevedore, Transcom, was entitled to rely on the Himalaya clause. As noted above, the Himalaya clause extended to ‘every right, exemption from liability, defence and immunity’ to the

---

<sup>325</sup> Ibid 461 (Smalkin CJ).

<sup>326</sup> Ibid 462 [6]–[9] (Smalkin CJ)

<sup>327</sup> Ibid 464 [10] (Smalkin CJ).

carriers' servants, agents, and independent contractors 'while acting in the course of or in connection with [their] employment'.<sup>328</sup>

Smalkin JC referred to *Herd v Krawill Corp* where the Court stated that such clauses 'must be strictly construed and limited to intended beneficiaries'.<sup>329</sup> The Court also noted that the word *stevedore* in itself is sufficient to recognise the intended beneficiary. As the Himalaya clause applied to all defences, the forum selection clause is as good a defence as any other might be.<sup>330</sup> The Court also noted that:

A third-party beneficiary is bound by the terms and conditions of the contract it invokes.

The beneficiary "cannot accept the benefits and avoid the burdens or limitations" of the contract. Therefore, Transcom, as a "Himalayan," third-party beneficiary of the bills of lading, is bound by the forum selection clauses it now asserts as a defense in this Court. It cannot take advantage of the clauses here but then object to jurisdiction in the appropriate court(s).<sup>331</sup>

The Court therefore dismissed the motion of Transcom Terminals Ltd.

11 *Norfolk Southern Railway Company v James N Kirby Pty Ltd*<sup>332</sup>

In this case, an Australian cargo owner sued the railroad company for damages to goods sustained when the railroad derailed. The railroad responded by claiming that they were covered by the Himalaya clause in the bill of lading issued by the carrier. The Court noted that the transport of goods 'from port in Australia to inland city in the United States, and between intermediary and shipper for end-to-end transportation of these same goods, were in nature of "maritime contracts"'.<sup>333</sup>

---

<sup>328</sup> Ibid.

<sup>329</sup> *Herd & Co v Krawill Machinery Corp*, 359 US 297; 79 SC 766 (1959).

<sup>330</sup> *Acciai Speciali Terni USA Inc v M/V Berane* 181 F Supp 2d 458 (D. Md, 2002) 464 [10] (Smalkin CJ).

<sup>331</sup> Ibid 465 [14]–[16] (Smalkin CJ).

<sup>332</sup> 543 US 14; 125 S Ct. 385 (2004).

<sup>333</sup> Ibid 386 (O'Connor J).

It was held that the cargo owner was bound to the clauses contained in the bill of lading. The Court reversed the decision of the Eleventh Circuit which relied heavily on *Herd v Krawill Corp*, holding that the Railway could not claim protection under the first bill as they were not in privity with the freight forwarder. The court also stated that the freight forwarder was not an agent of Kirby and hence could not bind Kirby to the second bill of lading.

The Court observed that Kirby hired a freight forwarding company to arrange for the end-to-end transport; the bill of lading noted that the journey started in Sydney. The goods were off-loaded in Savannah and then transported by rail to Huntsville. Kirby did not take the opportunity to declare the true value instead opting for the contractual limitation liability set out in the COGSA as follows:

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding \$500 per package lawful money of the United States ... unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.<sup>334</sup>

Further, the Himalaya clause stated:

These conditions [for limitations on liability] apply whenever claims relating to the performance of the contract evidenced by this [bill of lading] are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract.<sup>335</sup>

The carrier Hamburg Sud also issued a bill of lading with a similar Himalaya clause, providing that the benefit of the limitation clause extends to all agents (including inland) carriers and all independent contractors whatsoever. The first question the Court resolved was whether the issue was one of maritime law or not. The Court decided that 'the trend in modern admiralty case law ... is to focus the

---

<sup>334</sup> Ibid 391 (O'Connor J).

<sup>335</sup> Ibid.

jurisdictional inquiry upon whether the nature of the transaction was maritime'.<sup>336</sup> This was so despite the land legs of transport because the conceptual, rather than spatial, approach does not alter the essentially maritime nature of the contracts, especially considering that the 'international transportation industry clearly has moved into a new era—the age of multi-modalism, door-to-door transport based on efficient use of all available modes of transportation by air, water, and land'.<sup>337</sup>

Turning to the merits of the case, the Court observed that the language in the first Himalaya clause makes it clear that the limitation extends to 'any servant, agent or other person (including any independent contractor)'.<sup>338</sup> The word 'any' has an expansive meaning and hence the language 'corresponds to the fact that various modes of transportation would be involved in performing the contract'.<sup>339</sup> The conclusion was that the railroad was an intended beneficiary of the Himalaya clause.

The Court then turned its attention to the second bill of lading relating to Hamburg Sud. The issue was whether the forwarding agent acted as Kirby's agent; this was answered in the negative. However, relying on *Great Northern R Co v O'Connor*,<sup>340</sup> the Court described the relationship as 'only [requiring] treating ICC as Kirby's agent for a single, limited purpose... when ICC contracts with subsequent carriers for limitation on liability... we hold that intermediaries, entrusted with goods, are "agents" only in their ability to contract for liability limitations with carriers downstream'.<sup>341</sup> The Court noted three reasons to come to their decision.

First, that in intercontinental ocean shipping carriers may not know if they are dealing with an intermediary or the cargo owner. To find out would be too difficult considering the fact that goods change hands in

---

<sup>336</sup> Ibid 393 (O'Connor J).

<sup>337</sup> Ibid.

<sup>338</sup> Ibid 397 (O'Connor J).

<sup>339</sup> Ibid.

<sup>340</sup> 232 US 508 (1914).

<sup>341</sup> Ibid 399 (O'Connor J).

intermodal transports. Secondly, ‘a rule prompting downstream carriers to distinguish between cargo owners and intermediary shippers might interfere with statutory and decisional law promoting non-discrimination in common carriage’.<sup>342</sup> Thirdly, referring back to *Great Northern R Co v O’Connor*, the decision produces an equitable result as Kirby can sue the freight forwarder for the loss exceeding the liability limitation. The Court justified the decision by stating:

It seems logical that ICC—the only party that definitely knew about and was party to both of the bills of lading at issue here—should bear responsibility for any gap between the liability limitations in the bills.<sup>343</sup>

Norfolk however could enjoy the benefits of not only the Hamburg Sud liability limitation, but also the one between the freight forwarder and the carrier and their decision did no more than provide a legal backdrop against which future bills of lading could be negotiated.<sup>344</sup>

#### *12 Mazda Motors of America Inc. v M/V Cougar ACE*<sup>345</sup>

This is an interesting in rem case; the question was whether the vessel was an agent, servant or sub-contractor of the carrier under the plain meaning of the Himalaya clause in the bill of lading and therefore whether the vessel could invoke the forum selection clause.<sup>346</sup> A shipment of automobiles was damaged but Mazda had only named the vessel as the defendant and not the carrier nor the owner of the vessel. The issue was that the jurisdiction clause in the bill of lading named Japan as the selected jurisdiction but Mazda had filed the current action in Oregon. Mazda contended that the forum clause only applied to in personam suits and not in rem, meaning that only the carriers were bound by it.

---

<sup>342</sup> Ibid.

<sup>343</sup> Ibid 400 (O’Connor J).

<sup>344</sup> Ibid.

<sup>345</sup> 565 F 3D 573 (2009).

<sup>346</sup> Ibid 575 (Susan P, Graber, Raymond, Fisher and Smith, Circuit Judges).

The Court rejected this argument and found that the vessel could benefit under the Himalaya clause which stated:

The Merchant undertakes that no claim or allegation shall be made against any servant, agent or Sub-Contractor of the Carrier which imposes or attempts to impose upon any of them, or upon any vessel owned or operated by any of them, any liability whatsoever in connection with the Goods, and, if any such claim or allegation should nevertheless be made, to indemnify the Carrier against all consequences thereof. Without prejudice to the foregoing, every such servant, agent and Sub-Contractor shall have the benefit of all provisions herein benefiting the Carrier as if such provisions were expressly for their benefit; and in entering into this contract, the Carrier, to the extent of those provisions, does so not only on its own behalf, but also as agent and trustee for such servants, agents and Sub-Contractors.<sup>347</sup>

The bill of lading also defined each of the terms and the definition of subcontractor, which was crucial in deciding the issue (emphasis added):

Sub-Contractor includes owners and operators of Vessels and space providers on Vessels (other than the Carrier), stevedores, terminal and group age operators, any independent contractor directly or indirectly employed by the Carrier in performance of the Carriage, their respective servants and agents, and *anyone assisting the performance of the Carriage*.<sup>348</sup>

The first observation the Court made was that the Himalaya clause is a contract like any other, therefore general interpretative principles apply. The problem with the first sentence of the Himalaya clause is that it forbids ‘claims against any “servant, agent or Sub-Contractor” that would impose liability on them “or upon any *vessel* owned or operated by any of them”’.<sup>349</sup> However under the COGSA, such a disclaimer is null and void and of no effect but does not reduce or nullify liabilities upon a vessel. The second sentence is unaffected insofar as the exemptions are still valid. Hence the Court noted that

---

<sup>347</sup> Ibid 577 (Susan, Graber, Raymond, Fisher and Milan D and Smith JR).

<sup>348</sup> Ibid.

<sup>349</sup> Ibid 578 (Susan, Graber, Raymond, Fisher and Milan D and Smith JR).

in the second sentence the exemption clause also benefits sub-contractors which are defined as ‘anyone assisting the performance of the Carriage’.<sup>350</sup>

The Court decided, as ‘anyone’ has an expansive plain meaning, that the vessel ‘[was] a sub-contractor because it plainly assisted the performance of the carriage; as the carrying vessel, it was indispensable to that performance’.<sup>351</sup> The Court also dismissed Mazda’s contention that Himalaya clauses are used only ‘to extend a carrier’s defences and liability limitations to certain *third parties* performing services on its behalf’.<sup>352</sup> However Mazda agreed that ‘the vessel ratified the bills of lading by transporting the cargo, which made the vessel a *first party* to those bills of lading’.<sup>353</sup> The vessel had therefore become a party to the bill of lading and hence the Himalaya clause.

### *C Commentary*

By virtue of *Herd v Krawill Corp.*, Himalaya clauses are valid in the US subject to the satisfaction of three basic conditions, as developed by the courts. First, a contractual relationship must exist between the contracting party and anyone who seeks to be protected by the Himalaya clause.<sup>354</sup> The courts also found it necessary that the party seeking protection under the clause must perform part of the contract which is included in the Himalaya clause.<sup>355</sup> Furthermore, in relation to this requirement, an independent contractor must perform an operation which can be termed to be ‘of a maritime nature’.<sup>356</sup>

---

<sup>350</sup> Ibid.

<sup>351</sup> Ibid.

<sup>352</sup> Ibid 580 (Susan, Graber, Raymond, Fisher and Milan D and Smith JR).

<sup>353</sup> Ibid.

<sup>354</sup> *Mori Seiki USA Inc. v MV Alligator Triumph* 990 F 2d 444, 448–450.

<sup>355</sup> *Tashio Marine & Fire Insurance Co. v The Vessel Gladiolus* 762 F 2d 1364, 1367 (Kennedy, Circuit Judge).

<sup>356</sup> *Caterpillar Overseas SA v Marine Transports Inc.* 900 F 2d 714 (1991) 724 (Russell, Circuit Judge).

Secondly, the Himalaya clause must be written in such a way that it is clear who is protected.<sup>357</sup> Courts have adopted a more flexible approach in the description of a protected third party. In the past the word 'bailee' was not considered to be precise enough,<sup>358</sup> however this is no longer the case; A clause indicating a well-defined class of beneficiaries such as stevedores or terminal operators is now acceptable.<sup>359</sup> In *Certain Underwriters at Lloyds' v Barber Blue Sea Line* the Court stated:

When a party seeking protection under a Himalaya Clause is not specifically mentioned therein, the party should, at a minimum, be included in a well-defined class of readily identifiable persons to which COGSA benefits are extended under the terms of the clause.<sup>360</sup>

As soon as inland carriers are employed, that is a door-to-door contract is at issue, the term to protect the inland carriage must be clear and unambiguous.<sup>361</sup> Thirdly, the benefit must be clearly stated, such as the package limitation or the one year delay for suit, but only if the benefit is not automatically granted via the COGSA.<sup>362</sup> If the COGSA limitation or any package limitation is part of the contractual clause, the shipper or the consignee must have been given a chance to increase the value of the goods.<sup>363</sup> Treitel furthermore argues that the United States position is somewhat different as it does not only rely

---

<sup>357</sup> *Herd & Co. v Krawill Machinery Corp*, 359 US 297, 305 (Whittaker J); Cf: *Steel Coils Inc. v M/V Lake Marion* (2002) AMC 1680, 1699 (Vance USDJ).

<sup>358</sup> *De Laval Turbine Co. v West India Industries* 502 F 2d 259, 1974 (Aldisert, Adams and Garth, Circuit Judges).

<sup>359</sup> See generally *LaSalle Machine Tool v Maker Terminals* 611 F 2d 56, 60 (1979).

<sup>360</sup> *Certain Underwriters at Lloyds' v Barber Blue Sea Line* 675 F 2d 266, 270 (Tuttle, Kravitch and Johnson, Circuit Judges).

<sup>361</sup> *Classic Fashions Inc. v Narrieras NPR, Inc.* 68 F Supp 2d. 1312 (SD Fla. 1999) (Highsmith J)

<sup>362</sup> *Croft & Scully v M/V Skulptor*, 508 F Supp 670 (1981), 673 [1]–[2] (Brown, Circuit Judge).

<sup>363</sup> *Mori Seiki USA Inc. v MV Alligator Triumph*, 990 F 2d 444, 451 (Hug, Circuit Judge).

on Lord Reid's first requirement but is similar to the English approach under the *Contract (Right of Third Parties) Act 1999*.<sup>364</sup>

In sum, the United States approach only relies on the existence of a clause conferring rights and immunities to a third party in a contractual clause. The exception to an enforcement of a valid Himalaya clause may occur in the event that the clause is 'contrary to public policy under state law'.<sup>365</sup>

## VII THE SOUTH AFRICAN JURISPRUDENCE

### *A Overview*

This section examines the application of the Himalaya Clause in a mixed legal system. It will be shown that in South Africa, the courts have tended to lean more towards the common law approach in applying Himalaya clauses but with an eye on civil law procedures. South African law is a combination of different legal systems. Due to its historical past it is influenced by the civilian tradition. Early Dutch settlers brought with them Roman-Dutch law, which is itself a blend of indigenous Dutch customary law and Roman law. Later during the British colonial period, common law was introduced and fused.<sup>366</sup>

South Africa implemented the *Carriage of Goods by Sea Act* in 1986 following the Hague-Visby Rules art V which extended the statutory right of the shipper and carrier to servants and agents, but not to independent contractors such as stevedores. It is not surprising that South African courts adopted the Himalaya clause in its own right. Furthermore, unlike the English legal system, South African courts have attempted to rely on the principle of *stipulatio alteri*. In practice this enables South African lawyers to be more comfortable with the

---

<sup>364</sup> Guenter Treitel, F.M.B. Reynolds and Thomas Gilbert Carver, *Carver on Bills of Lading* (London: Sweet & Maxwell, 3<sup>rd</sup> ed 2011) 474.

<sup>365</sup> Thomas J Schoenbaum, *Admiralty and Maritime Law*, (St. Paul, Minn: West Group, 3<sup>rd</sup> ed 2001) 533.

<sup>366</sup> *South Africa's Judiciary* (February 2014) SouthAfrica.info <<http://www.southafrica.info/about/democracy/judiciary.htm#Veaqk7sViUk#ixzz3kZ8IKj86>>.

Himalaya clause, but even a suggestion that the shipper makes the offer to a class of potential acceptors stretches the doctrine beyond its limits.<sup>367</sup>

1 *Santam Insurance Co Ltd v SA Stevedores Ltd*<sup>368</sup>

Engines belonging to Toyota were discharged from the vessel Sanko Vega by servants of the defendant. Due to their negligence, one case was dropped and the engines were damaged. The question was whether the independent contractor was able to take advantage of the one year limitation period and the limitation per package provisions pursuant to the applicable Hague-Visby Rules.

Wilson J understood that the ratio of the Himalaya clause was the relevant issue, namely whether an unconnected party to a contract can still rely on the exemption clause. He proceeded to analyse the relevant English jurisprudence in detail beginning with *Elder Dempster*, and progressing via *Adler v Dickson* to *Midland v Scruttons* and eventually arriving at *The New York Star*. He consulted Australian, United States and Canadian cases.<sup>369</sup>

Reverting to the present case, Wilson J looked at clause 4 of the bill of lading which stated:

(LIABILITY OF STEVEDORES AND OTHERS)

Without prejudice to any provision hereof, it is hereby expressly agreed that all servants, agents and independent contractors including in particular but not by way of limitation stevedores used or employed by the carrier for the purpose of or in conjunction with the performance of any of the Carrier's obligations under this Bill of Lading shall in consideration of their agreeing to be so used or employed have the benefit of all rights, defences, exceptions from or limitation from liability and immunities for whatsoever nature and referred to incorporated herein applicable to the Carrier or to which the carrier is entitled

---

<sup>367</sup> John Hare, *Shipping Law & Admiralty Jurisdiction in South Africa* (Juta & Co Ltd, 1999) 403.

<sup>368</sup> [1989] 1 All SA 196 (Local Division).

<sup>369</sup> Ibid 196–205 (Wilson J).

hereunder so that in no circumstances shall any such servants, agents or any independent contractor be under any liability greater than that of the Carrier hereunder. It is hereby further expressly agreed that for the purposes of the foregoing provision the Carrier is or shall be deemed to be acting as agent or trustee on behalf and for the benefit of all persons who are or might be its servants, agents and independent contractors from time to time for the purpose of or in connections with the performance of any of the Carrier's obligations under this Bill of Lading and that all such persons shall to this extent be or be deemed to be parties to the contract contained in or evidence by this Bill of Lading.

Evidence was produced that Sanko Shipping, working directly with Toyota Japan, was aware of the Himalaya clauses in the 1984 and 1983 bills of lading. It was also agreed that this was a test case as to the efficacy of a Himalaya clause in a bill of lading in terms of Roman-Dutch law.<sup>370</sup> However the evidence in effect pointed to the fact that the parties were aware of the clauses and Wilson J noted:

Thus in reading of the contract itself it appears that the carrier was acting on behalf of the stevedores and that Clause 4 was an acceptable "Himalaya clause" conferring protection on and exemption do the Defendant. I have however, in addition, in deciding what the intention of the parties to the agreement was had regard to the agreement in its contextual setting.<sup>371</sup>

Wilson J also observed that Sanko inserted clause 4 into the contract and that the defendant satisfied the first three requirements enunciated by Lord Reid in *Miland v Scrutton* and is therefore entitled to the protection and limitations as set out in clause 4.<sup>372</sup>

*2 Bouygues Offshore and Another v Owner of the MT Tigr and Another*<sup>373</sup>

---

<sup>370</sup> Ibid 207 (Wilson J).

<sup>371</sup> Ibid.

<sup>372</sup> Ibid 208 (Wilson J).

<sup>373</sup> [1995] 4 SA 49 (Constitutional Court).

This is a Towage contract where a clause was inserted exempting the Charterer of the tug from any liability for loss or damage sustained by the tow. The first applicant was the owner of a barge which had been grounded on the Cape Town coastline while being towed by a tug owned by the first respondent and chartered by the second respondent. The applicant sued the two respondents for damages as well as for repayment of the towage price as it had already paid. The problem was that the tug, due to problems with the engines, could only operate at 60% capacity. Repairs were considered to be made before the towage took place in Point Noire in the Congo. As it turned out it could not be done and hence repairs were to be undertaken in Cape Town after the towage had been performed.

The towage contract contained a clause exempting the second respondent from liability for any loss or damage sustained by the tow, whether caused through breach of contract, negligence or any fault in addition to a Himalaya clause extending the exemption to the first respondent. The applicant's case was such that it had validly rescinded the contract by reason of a fraudulent misrepresentation concerning the tug's towing capacity.<sup>374</sup> The tug was not seaworthy and therefore not ready to perform the tow. It resulted that, due to a severe storm, the tug could not keep the tow away from the coast line and hence contributed to the grounding.

The Court held that there was a misrepresentation as to the capacity of the tug and that the applicant was entitled to rescind the contract. Importantly, because the misrepresentation was made by the first respondent, the applicant can rescind the contract between it and the first respondent contained in the Himalaya Clause.<sup>375</sup> Farlam J specifically noted:

[T]he whole history of the Himalaya clause made it clear that the mischief which it has been designed to combat was the exposure of the servant, agent or subcontractor of a carrier or other such party to liability from which the carrier himself was exempted: it had not been intended (nor could the other contracting party,

---

<sup>374</sup> Ibid 50 (Scott JJA).

<sup>375</sup> Ibid 54 (Scott JJA).

such as the shipper, reasonably have anticipated that there was an intention) to create an exemption which would ensure for the benefit of the servant, agent or subcontractor even where the carrier's exemption was lost, for example, through rescission.<sup>376</sup>

The Court subsequently allowed the claims of the applicant against the respondent.

*3 Owners of Cargo Formerly laden on Board of MV "Mas Tiga" v Confreight Cargo Management Centre Pty Ltd*<sup>377</sup>

The facts are rather complicated. Air-conditioning units of the plaintiff were damaged whilst being stored at the defendant's premises. Two bills of lading were involved, each containing a Himalaya clause. Allied Sea Freight Line (ASL) issued a bill of lading and so did the Cargo Management Centre (CMC). The plaintiff contracted with Italfreight acting as agent of ASL to carry the cargo from Hong Kong to Johannesburg under the ASL bill of lading. ASL then contracted the carriage from Hong Kong to Durban to the Malaysian International Shipping Corporation (MISC) on the terms of the MISC bill of lading.<sup>378</sup> MISC was the carrier to Aprile China Ltd (an agent of ASL), the Aprile Group's Hong Kong based company was the shipper. Italfreight was named as the consignee. Both bills of lading contained a clause entitling them to subcontract on any terms, the whole or any part of the carriage, as well as a Himalaya clause.

Bridge Shipping Ltd, as agent of MISC, contracted with the defendant to store the goods pending transport to Johannesburg on terms of the contract between ASL and the plaintiff. The goods were damaged while in possession of the defendant due to the negligence of his employees. At the time the damage occurred the plaintiff was the owner of the air conditioners. The defendant admitted liability but contended that he was protected by the time bar in one or both of the bills of lading. The central question was whether the defendant could

---

<sup>376</sup> Ibid.

<sup>377</sup> [2001] JOL 8954 (Local Division).

<sup>378</sup> Ibid 8957 (Theron J).

establish the existence of a contractual relationship between him and the plaintiff.

Theron J noted that the Himalaya clause had its origin in *Adler v Dickson* and that the privity rule gave way to commercial reality in *Midland v Scruttons*. However, he distinguished this case by noting that the defendant was twice removed from a party to the contract.<sup>379</sup> He furthermore referred to *Santam Insurance Company Ltd v SA Stevedores Ltd*,<sup>380</sup> which introduced the Himalaya clause as part of South African law. He proceeded to lay out the contractual chain as follows:

1. The plaintiff contracted with ASL on an ASL bill of lading.
2. ASL in turn contracted with MISC on the MISC bill of lading.
3. MISC in turn contracted with the defendant according to the defendant's general trading terms.<sup>381</sup>

The defence contended that there are five grounds upon which the defendant can rely on the time bar on either the ASL or MISC bills of lading. These were:

1. ASL acted as agent for the plaintiff
2. Defendant authorised MISC to contract for its protection
3. MISC ratified ASL's action
4. MISC acted as agent for ASL
5. *Stipulatio alteri*.<sup>382</sup>

The Court addressed each of the contentions in turn however only the relevant points will be discussed below.

(a) *ASL acted as agent for the plaintiff*

The Court dismissed this argument. The starting point was the fact that the plaintiff contracted with Italfreight acting as agent of ASL to

---

<sup>379</sup> Ibid 8954 (Theron J).

<sup>380</sup> [1989] 1 All SA 196 (Local Division).

<sup>381</sup> Ibid 203 (Wilson J).

<sup>382</sup> Ibid.

carry the cargo to Johannesburg on the terms of the ASL bill of lading. ASL was the carrier and hence liable from the time the cargo was taken into its charge until the time it was delivered in Johannesburg. ASL was entitled to sub-contract and did so by engaging MISC to carry the cargo from Hong Kong to Durban under the MISC terms.

Theron J noted:

The plaintiff's contractual relationship was with ASL and not with ASL's sub-contractors. There is accordingly no proper basis for the defendant's contention that the defendant can rely on the MISC bill of lading time-bar and Himalaya clause.<sup>383</sup>

(b) *The defendant authorised MISC to contract for its protection*

The Court also dismissed this argument as it is inconsistent with the terms of the authority granted to MISC and cannot be sustained:

There is no evidence whatsoever to suggest that MISC, whatever the terms of the authority furnished to it by the defendant, authorises or ratified ASL's act in purporting to contract as agent or trustee for persons such as MISC and the defendant.<sup>384</sup>

(c) *MISC acted as agent for ASL*

The defence argued that the trading terms of MISC were wide enough to include ASL contracting with the plaintiff for the defendant's protection. The Court dismissed this claim by arguing:

Clause 4 of the MISC bill of lading provides that "the carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage. "Accordingly MISC, in contracting with the defendant to store the containers, was not acting on anybody's behalf, but its own.<sup>385</sup>

(d) *Stipulatio alteri*

---

<sup>383</sup> Ibid 206–07 (Wilson J).

<sup>384</sup> Ibid 209 (Wilson J).

<sup>385</sup> Ibid 210 (Wilson J).

The defence argued that the time bar and the Himalaya clause in the ASL bill of lading constitute a *Stipulatio alteri*. The question was whether the defendant accepted the benefits of the *Stipulatio* which had to conform to the usual requirements for the acceptance of an offer, in particular, that acceptance must be communicated to the offeror. Furthermore, the plaintiff knew that the goods would be stored by the defendant. The Court noted:

The argument that such knowledge, however gained, constitutes communication of the implied acceptance of the benefit extended by the ASL bill of lading, is fallacious. The plaintiff may well have acquired such knowledge only after the cargo had been damaged.<sup>386</sup>

Consequently, the Court held that the defendant could not rely on either of the Himalaya clauses, as he was twice removed from any party to the contract.

*4 Tebe Trading Pty Ltd v Mediterranean Shipping Company (Pty) Ltd*<sup>387</sup>

The appellant entered into an agreement with the respondent to ship a consignment of litchis to the Middle East. He entered into the contract on the representation that the fruit would arrive within 14 days at its destination. It arrived more than a month late and could not be sold hence the appellant sued for breach of contract or alternatively breach of a duty of care. The respondent contended that there is no valid contract between the grower and the appellant and hence ownership had not passed and the risk remains with the grower. The lower court ruled that the essential elements of agreement as to price had not been established and hence the appellant lacked jurisdiction.

On appeal Levinsohn J isolated six issues which needed to be resolved:

---

<sup>386</sup> Ibid 211 (Wilson J).  
<sup>387</sup> [2006] JOL 16093 (D).

1. Does the plaintiff have locus standi to sue, whether in contract or in delict?
2. In concluding a contract with the plaintiff, did the defendant contract as principle or agent for Mediterranean Shipping Company SA of Geneva?
3. If a contract was concluded between the plaintiff and the defendant, principle to principle:
  - a. What were the terms of the contract? This includes whether or not the provisions of the Hague-Visby rules apply to the contract.
  - b. Did the defendant breach the contract.
4. Did the defendant owe a duty of care to advise the plaintiff if:
  - a. The estimated date of departure of the MV “MSC Spain” on voyage from Durban to Jebel Ali was delayed; and
  - b. The route of the vessel from Durban to Jebel Ali was changed?
5. If such a duty of care did exist, did the defendant breach that duty with fault so as to incur liability to the plaintiff?
6. Can the defendant rely on the Himalaya clause in the bills of lading, as pleaded; if so
  - a. Is the defendant excused of all liability that it might otherwise have been found to have to the plaintiff?
  - b. If not excused of all liability, can the defendant rely on the provisions of the Hague-Visby Rules as pleaded?<sup>388</sup>

It is convenient to examine this case under the headings as proposed by Levinsohn J.

(a) *Does the plaintiff have locus standi to sue, whether in contract or in delict?*

The Court referred back to the facts as presented in the lower court. The lower court merely decided that the plaintiff had no standing hence any other issues were not deliberated upon. The salient facts were as follows. The vessel did not depart on 6 December and the

---

<sup>388</sup> Ibid 16095–6 (Scott, Farlam, Cloete, Lewis and Cachalia JJA).

plaintiff amended its booking. The containers would now be carried from Jebel Ali to Damman in Saudi Arabia. The vessel duly sailed to the outer anchorage on December 13. On the same date the vessel was instructed to re-enter the Durban and 171 containers were discharged and the vessel sailed to Maputo on December 15. The planners in Geneva decided that the vessel ought to take goods on board from another vessel which was towed into the harbour of Maputo. The vessel eventually arrived at Jebel Ali on 10 January 2002. Transshipment then took place and the containers finally arrived at Dammam on 14 January 2001.

The lower court decided that the plaintiff had no standing as there was no contract between it and the supplier of the goods. The issue was that the essential element as to price was not established. The cross examination in the lower court in essence established that the grower was not paid any price nor was a price determined. The plaintiff would have sold the litchis at the best price in the Middle East that is the price is only fixed once the market determines it at the place of sale. In essence a base price is determined - that is - the grower indicates what price he would expect in this case R35. The final price is only determined once the goods are sold. The plaintiff then would deduct costs and a profit mark up. If the market is favourable the grower gets more than R35 or conversely if the market is down less. The plaintiff in this case – given the adverse situation – paid the grower R35. The Court determined that the price was not expressly stated but determinable hence a contract existed.<sup>389</sup>

*(b) In concluding a contract with the plaintiff, did the defendant contract as principle or agent for Mediterranean Shipping Company SA of Geneva?*

Evidence was presented indicating that the shipping line sent a booking confirmation stating in para 2:

Bills of Lading must be presented to MSC at least four (4) days prior sailing date. MSC required four (4) copies.

---

<sup>389</sup> Ibid 16106–8 (Scott, Farlam, Cloete, Lewis and Cachalia JJA).

It was also established that MSC is the agent of MSC Geneva and it was established that the defendant does not operate any ships. Under the agreement the defendant was authorised to sign on behalf of the principals or master bills of lading and all other shipping documents as required. The Court noted that there is clear authority in English law that the contract of carriage is concluded prior to the issue of a bill of lading and it is contemplated that the bill of lading includes terms which are contemplated by the contract.<sup>390</sup> The Court held that in this case the contract which was formed by the forwarding agent and MSC Geneva and hence the plaintiff failed to prove that he has a contract with the defendant. The Court found in favour of the defendant.

In the light of the finding in question 2, question 3 became obsolete.

*(c) Did the defendant owe a duty of care to advise the plaintiff in relation to time and route change?*

The Court noted that the defendant solicited the business of the plaintiff on the clear understanding that the ship would depart on or about 7 December and that there would be a short transit time to the port of destination.

The crisp question that arises is whether the defendant in its capacity as an agent ought to have informed the plaintiff that the transit time would be significantly extended so that the plaintiff could then decide whether it elected to remove the containers from the vessel and make other arrangements for the disposal of the litchis.<sup>391</sup> The Court noted that the defendant was not given the relevant information on 14 December and that there was an overwhelming probability that the defendant must have known of the re-routing of the ship and that it would take significantly longer to arrive at its intended destination.

This conclusion led the Court to ask the next question namely whether there was a duty to inform. The conduct in question is only unlawful

---

<sup>390</sup> Ibid 16111–2 (Scott, Farlam, Cloete, Lewis and Cachalia JJA).

<sup>391</sup> Ibid 16115 (Scott, Farlam, Cloete, Lewis and Cachalia JJA).

‘if there was a duty to act to avoid harm to the plaintiff’.<sup>392</sup> The Court stated:

I am of the opinion that the defendant knew on 14 December 2001 that there would be an extended transit time. It failed to inform the plaintiff thereof in circumstances where it had a duty to do so and would have foreseen that a failure to do so would result in harm to the plaintiff. It was therefore negligent. The fourth and fifth question are answered in favour of the plaintiff.<sup>393</sup>

(d) *Can the defendant rely on the Himalaya clause in the bills of lading, as pleaded?*

The defendant relied on clause 18 which in the relevant parts notes:

‘Liability of servants and sub-contractors’ It is hereby expressly agreed that no servant or agent of the Carrier, including any independent sub-contractor employed by the Carrier in any circumstance whatsoever be under any liability whatsoever to the Merchant for any loss or damage or delay of whatsoever kind arising or resulting directly or indirectly from any act neglect or default on his part while acting in the course of, or in connection with his employment.<sup>394</sup>

The bill of lading was assigned by the defendant as agent of the carrier. The Court noted the fact that Himalaya clauses are part of South African law referring to *Santam Insurance Co.*<sup>395</sup> As the Court already found the defendant negligent the question was whether the negligence occurred ‘while acting in the course of, or in connection with his employment’.<sup>396</sup>

---

<sup>392</sup> *McCann v Goodall Group Operations (Pty) Ltd* [1995] 2 SA 718 (Constitutional Court) 722 (Conradie JA).

<sup>393</sup> *Ibid* 751 (Conradie JA).

<sup>394</sup> *Ibid* 752–53 (Conradie JA).

<sup>395</sup> *Ibid* 754 (Conradie JA).

<sup>396</sup> See cl 18; *McCann v Goodall Group Operations (Pty) Ltd* [1995] 2 SA 718 (Constitutional Court) 722, 752–53 (Conradie JA).

Levinsohn J - after consulting agency contract between the defendant and MSC Geneva -argued:

Thus, in the clause in question, where the expression “while acting in the course of ... his employment” is used, it must be understood to confine the particular “course of employment” to the acts which are required to assist in the performance of the contract of carriage. It could, in my view, hardly be contended by the defendant that if, in the course of marketing the services of MSC Geneva, the defendant somewhat negligently caused the plaintiff to suffer loss, the defendant could invoke the Himalaya stipulation in the bill of lading which limits liability are necessary confined to stipulations concerning that specific contract. In my view, the words “in connection with,” although objectively capable of a wide construction, must, for the purpose of ascertaining their meaning in the Himalaya Clause, be restrictively construed to limit their application to the contract of carriage. The conduct which I have found to be negligent in this case was an omission to give a customer of the carrier information which would, in all probability, have resulted in that customer cancelling his contract with the defendants principal.<sup>397</sup>

The Court found that the plaintiff was successful on issues 1, 4, 5 and 6 identified above and ruled in favour of the plaintiff.

*5 Mediterranean Shipping Company (Pty) Ltd v Tebe Trading Pty Ltd*<sup>398</sup>

The above case was appealed again in 2008. In essence the appeal was directed at the issues as noted in the above case namely:

1. Did the defendant owe a duty of care to advise the plaintiff if:
  - a. The estimated date of departure of the MV “MSC Spain” on voyage from Durban to Jebel Ali was delayed; and

---

<sup>397</sup> Ibid 757–58 (Conradie JA).

<sup>398</sup> [2008] 6 SA 595 (Supreme Court of Appeal).

- b. The route of the vessel from Durban to Jebel Ali was changed?
2. If such a duty of care did exist, did the defendant breach that duty with fault so as to incur liability to the plaintiff?

Acting Justice Scott, after reciting the important facts, came again to the conclusion that *Tebe* knew of the initial delay but was not aware that the vessel returned to port again. The Court also referred to the fact that *Tebe* was aware of the term in the bill of lading, namely clause 4, which allowed the carrier to deviate from the advertised or ordinary route. Acting Justice Scott noted:

Tebe seeks in effect to circumvent the consequences of the contract by holding the principal's agent personally liable in delict for failing to afford Tebe the opportunity of removing its containers from the vessel on a ground not amounting to a breach of contract on the part of the principal. But agents are contractually bound to protect the interests of their principals. The legal duty that Tebe contends was owed to it by the appellant would therefore be in conflict with the contractual obligation which the latter has to its principal. Even if it were to be accepted that the appellant was negligent, there can be no good reason in my view, given the contractual setting, for the existence of a legal duty on the appellant to take such steps as may have been reasonable to prevent the harm.<sup>399</sup>

The appeal was upheld and the Court found it unnecessary to consider the question of the Himalaya clause.

*6 LTA Construction Ltd v Mediterranean Shipping Company Depots Pty Ltd*<sup>400</sup>

This case concerned a mobile crane was offloaded in Durban. Due to the delay in obtaining customs clearance the crane was shifted to the premises of the defendant where the crane sustained damage. The issue was again whether the defendant is protected by clause 17 and 19 of the bill of lading. The initial defence in relation to lapse of time

---

<sup>399</sup> Ibid 604 (Scott, Farlam, Cloete, Lewis and Cachalia JJA).

<sup>400</sup> [2006] JDR 0303 (Local Division).

was abandoned as it was made clear to the Court that the defendant agreed on an extension. Clause 17 governed the period of responsibility of the carrier and his agents which was restricted to the carriage operation only. That is, all events during or before loading and after discharge, is the sole responsibility of the Merchant.

Clause 18, relating to liability of servants and subcontractors, expanded clause 17. It specifically included stevedores, terminal operators and any other independent contractors. It noted in the important parts:

It is hereby expressly agreed that no servant or agent of the Carrier, including any independent subcontractors employed by the carrier shall in any circumstances whatsoever be under any liability whatsoever to the Merchant for any loss or damage or delay of whatsoever kind arising or resulting directly from any act, neglect or default on his part while acting in the course of his employment ... the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of any person who might be his servants or agents (including independent contractors) and all such persons shall be deemed to be party to this Bill of Lading.<sup>401</sup>

Hurt J posed the question of whether clauses 17 and 18 can discharge the defendant from any obligations. He also noted that clause 18 was a version of a Himalaya clause. He stated that ‘the development of the law dealing with Himalaya clauses is concisely dealt with in a judgment by Wilson J in *Santam Insurance Co Ltd v SA Stevedores Ltd*’.<sup>402</sup> Contrary to *Santam Insurance* where South Africa Law has applied this contract was governed by English law pursuant to clause 2 of the contract.

He therefore approached the issue with English law in mind, relying on the principles put forward by Lord Reid in *Midland v Scruttons*. Justice Hurt also noted that the plaintiff argued that the defendant could not rely on *Midland v Scruttons* and especially on clause 18 because:

---

<sup>401</sup> Ibid 308 (Hurt J).

<sup>402</sup> Ibid 310 (Hurt J).

- a. The defendant had not established that the Carrier had the defendant's authority to conclude a contract with the Plaintiff on behalf of the Defendant nor had it been established that the Defendant had subsequently ratified any such contractual stipulations on its behalf (3<sup>rd</sup> of Lord Reid's requirements);
- b. The defendant had not established that he has given any consideration, as required by the English law of contract, in return for the contractual protection for which it stipulated in its plea; and
- c. The bill was intended to apply only from the time of loading to the time of discharge onto the wharf, and its conditions did extend to cover any situations after discharge.<sup>403</sup>

Justice Hurt addressed the three objections. As to the first one he noted that the defendant worked closely with the Mediterranean Shipping Company for the past five years. He noted that:

In my view this evidence clearly establishes that either blanket or express authority or implied authority, by the Defendant to the Carrier [was given] to conclude a contract on its behalf.<sup>404</sup>

In relation to the issue of consideration the Court simply noted that the ruling in *The Eurymedon* effectively answered the issue of consideration. The Court also noted that the dissenting judgments of Lord Simon of Glaisdale and Viscount Dilhorne were effectively dispelled in *The New York Star*. Hurt J specifically stressed the following point:

Clearly their Lordships were, in this decision, stressing the importance of commercial efficacy over and above the possible results of too pedantic an approach to legal principle. Accepting that this is the approach dictated by English law, there seems to me to be no reason to draw any distinction between the facts in this case and those in *New York Star*.<sup>405</sup>

---

<sup>403</sup> Ibid 314 (Hurt J).

<sup>404</sup> Ibid 315 (Hurt J).

<sup>405</sup> Ibid 319 (Hurt J).

As to the third point the defence argued that the contract of carriage had ended and specifically argued that clauses 5 and 17 were relevant. Clause 5 *inter alia* noted that discharge to the wharf ‘shall constitute due delivery of the goods under the Bill of Lading’ and clause 17 which is entitled ‘Period of Responsibility’ stated:

The carrier or his agent shall not be liable for loss or damage to the goods during the period before loading and after discharge from the vessel, howsoever such loss or damage arises.<sup>406</sup>

His Honour did not agree with the partial reading of the clauses by the defence. In particular ‘clause 17 made specific reference to the contingency that goods might be “in the custody of the Carrier or his servants before loading and after discharge”’.<sup>407</sup> The Court also took note of *New York Star* where storage before actual delivery was a standard practice and that it was within the contemplation of the Plaintiff and Mediterranean Shipping Company that removal and storage services would be rendered in order to avoid unnecessary charges if the goods are removed by the port authority. The Court granted judgment in favour of the defendant.

*7 MT Fotiy Krylov v Owners of the Mt Ruby Deliverer*<sup>408</sup>

The charterer of the *MT Fotiy Krylov* applied to an order to set aside the arrest of the vessel. The reason for the arrest was the collision between the tug *MT Nikolay Chiker* and the *MT Ruby Deliverer*. The collision, as alleged, was caused by the negligence of the master/or crew of the *MT Nikolay Chiker*. It was undisputed that the *MT Fotiy Krylov* was an associated ship to the *Nikolay Chiker*. The tug owner was to tow the rig (*Ruby Deliverer*) from Brazil to India or Pakistan. The obligation with regard to getting the rig to its destination fell upon the tug owner.

---

<sup>406</sup> Ibid 320 (Hurt J).

<sup>407</sup> Ibid 322 (Hurt J).

<sup>408</sup> [2008] 5 SA 434 (Constitutional Court).

For the purpose of this article, the relevant issue was the argument that the cause of action was time barred and that the jurisdiction clause within the towing contract contained a Himalaya clause.<sup>409</sup>

Clause 19 of that agreement, which includes the Himalaya clause, reads as follows:

All exceptions, exemptions, defences, immunities, limitations of liability, indemnities, privileges and conditions granted or provided by this agreement or by any applicable statute rule or regulation for the benefit of the Tug owner or Hirer shall also apply to and be for the benefit of demise charterers, subcontractors, operators, masters, officers and crew of the Tug or Tow and to and be for the benefit of all bodies corporate, parent of, subsidiary to, affiliated with or under the same management as either of them, as well as all directors, officers, servants and agents of the same and to and be for the benefit of all performing parties performing services within the scope of this agreement for or on behalf of the Tug or Tug owner or Hirer as servants, agents and subcontractors of such parties. The Tug owner or Hirer shall be deemed to be acting as agent or trustee of and for the benefit of all such persons, entities and vessels set forth above but only for the limited purpose of contracting for the extension of such benefits to such person, body or vessel.<sup>410</sup>

Furthermore, clause 25 also provided that the agreement is governed by English Law and any disputes must be submitted to the High Court of Justice in London, while clause 24 provided a one year time limit to bring suit.<sup>411</sup>

Justice Davis noted that the crux of the issue was whether the defendant performed a service within the scope of the Towcon agreement. If he had, then the Himalaya clause becomes effective and he can rely on the protection granted under it. *Santam Insurance*, as well as *The Starsin*,<sup>2</sup> was noted to explain the effect of the Himalaya clause. His Honour came to the conclusion that:

---

<sup>409</sup> Ibid 441 (Davis J).

<sup>410</sup> Ibid.

<sup>411</sup> Ibid 442 (Davis J).

A contract was concluded and that it was so contracted and further that it took place within the context of the broader Towcon agreement that is to fulfil any obligation to provide in assisting tug services.<sup>412</sup>

Considering clauses 19, 24 and 25 the Court found for the plaintiff and hence dismissed the action in rem.

### B *Commentary*

South Africa, being a mixed legal system, has adopted the Himalaya clauses as developed in England. South African courts are referring to *Santam Insurance* as having introduced the Himalaya clause as part of South African law. It is remarkable to observe how the South African courts have applied the Himalaya clause. It was used in a far wider context than anywhere else. Normally the issue was whether the clause allowed the defendant to rely on the Hague-Visby rule in order to limit their liability or claim that the time to bring suit has elapsed.

In contrast, the issues where the Himalaya clause applied in South Africa ranged from the usual one year limitation period and the limitation per package provisions to towage - that is, actions *in rem* - to contract formation and hence whether the Himalaya clause is applicable. Most importantly the principle of commercial efficacy within a contractual setting is a paramount consideration for South African courts.

## VIII THE HIMALAYA CLAUSE – THE DISCUSSION

### A *Overview*

This chapter discusses the utility of the Himalaya clause referring to jurisprudence and to scholarly writing. A discussion of the utility of the Himalaya clause is not new and can be traced back to *Midland v Scruttons* where Viscount Simonds noted:

---

<sup>412</sup> Ibid 448 (Davis J).

For to me heterodoxy, or, as some might say, heresy, is not the more attractive because it is dignified by the name of reform. Nor will I easily be led by an undiscerning zeal for some abstract kind of justice to ignore our first duty, which is to administer justice according to law, the law which is established for us by Act of Parliament or the binding authority of precedent. The law is developed by the application of old principles to new circumstances. Therein lies its genius.<sup>413</sup>

No doubt the history of the Himalaya clause indicates that to some judges it was heresy to abandon the privity rule to others it exemplified the genius of English law in developing legal concepts specifically taking into consideration commercial realities. The function and application of the privity rule attracted much criticism not only in academic but also in judicial circles. Lord Diplock argued that the Privity rule is ‘an anachronistic shortcoming that has for many years been regarded as a reproach to English private law’.<sup>414</sup> Lord Steyn, 12 years later, also commented:

The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Moreover, often the parties, and particularly third parties, organise their affairs on the faith of the contract.<sup>415</sup>

Not surprisingly, Tetley argues that ‘the Himalaya clause is an ingenious, short-term solution to a difficult problem, but is a solution which raises infinitely more problems than it solves’.<sup>416</sup> The crux of the problem is who and how far should exemption clauses give protection to the person involved in the maritime adventure. Arguably, the issue is that persons who are not party to the underlying

---

<sup>413</sup> *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446, 467–8 (Viscount Simonds).

<sup>414</sup> *Swain v The Law Society* [1983] 1 AC 598, 611 (Lord Brightman, Lord Diplock, Lord Bingham).

<sup>415</sup> *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68, 76 (Dillon, Steyn, Waite LJ).

<sup>416</sup> Tetley, above n 47, 45.

contract are able to be protected though the main contract which has been viewed as encouraging third parties not to exercise due diligence in the handling of goods. It ignores the basic principle that persons who negligently cause damage to goods are held responsible. The underlying question is how far can an exemption clause protect parties? It is uncontested that the carrier can protect himself contractually when entering into a contract with a shipper. The foundation is in contract law and furthermore the various Carriage of Goods Acts and conventions have also introduced protection for the carrier against claims by the shipper or consignee.

Tetley argued that Lord Goff seemed to have missed this important point when reviewing the Himalaya clause in *The Mahkutai* with a confusing declaration.<sup>417</sup> Lord Goff stated:

In more recent years the pendulum of judicial opinion has swung back again, as recognition has been given to the undesirability, especially in a commercial context, of allowing plaintiffs to circumvent contractual exception clauses by suing in particular the servant or agent of the contracting party who caused the relevant damage, thereby undermining the purpose of the exception, and so redistributing the contractual allocation of risk which is reflected in the freight rate and in the parties' respective insurance arrangements.<sup>418</sup>

However, reading it closer and within the context of the judgment, Lord Goff correctly stated that the pendulum has swung back in favour of plaintiffs to sue servant and agents, that is, all those who are not directly party to the underlying contract. The argument should have been divided into two questions, as set out below.

First, should the carrier be able to protect his servants and agents? And second, should a third party whose only connection to the maritime adventure is a contract between itself and the carrier be protected as well? Arguably the former is desirable as employees and agents are directly connected to the carrier and as noted in *Adler v Dickson*, the employer would stand behind his employees.

---

<sup>417</sup> Ibid 445.

<sup>418</sup> *The Mahkutai* [1996] AC 650, 661 (Lord Goff).

Furthermore, the agent acts on behalf of his principle and hence a clause including agents and employees is commercially sound as the result in most cases is the same namely the carrier pays the damages. However, to widen the privity rule to include totally unconnected parties - such as stevedores - is another matter.

However, Lord Goff's view that in essence the Himalaya clause redistributes 'the contractual allocation of risk which is reflected in the freight rate and in the parties' respective insurance arrangements'<sup>419</sup> is open to different opinions. From an insurance point of view, the Himalaya clause increases the risk as a third party whose actions need to be contemplated entered into the protection of the contract. There is no redistribution of risk at all, indeed, there is a reduction of insurance earnings. Without the protection of the Himalaya clause not only the carrier but also the stevedores would need to take out insurance. Furthermore, if the buyer took out insurance there is merely a shift of insurance but not a reduction.

Tetley argued that:

Theft and pilferage continued in epidemic proportions in the Port of Montreal until finally stevedores and terminal operators were held responsible for negligence by the Quebec courts. Thereafter, losses were considerably reduced, insurance premiums of shippers and consignees as well as stevedores and terminal operators were reduced and the port experienced a surge in traffic.<sup>420</sup>

The question then is how to deal with third party benefits considering that shipping is a transnational legal issue and harmonisation of rules is desirable. Domestic and international rules have taken note of the problem. In Canada several court judgments explored where the limitation of the Himalaya clause lies. In particular a right was established that a limitation of liability agreement has no effect in a case of gross negligence.<sup>421</sup> In *Marubeni America Corporation v*

---

<sup>419</sup> Ibid.

<sup>420</sup> Tetley, above n 47, 45.

<sup>421</sup> *Eisen Und Metall AG v Ceres Stevedoring Co. Ltd* [1977] 1 Lloyd's Rep 665.

*Mitsui OSK Lines Ltd*<sup>422</sup> Marceau J, despite agreeing with the judgment in *Eisen*, nevertheless also agreed that the defendants were covered by the exception clause. He specifically stated that:

The general obligation of prudence and diligence required by the Civil Code cannot include all the duties that a cargo handling firm might have to assume in its capacity of a commercial undertaking within a framework of a contract. On a purely delictual level, plaintiff has failed to prove fault within the general meaning of the law.<sup>423</sup>

At this stage Canada, specifically the Province of Quebec, appears to be the only common law country where gross negligence in effect ‘trumps’ a well written Himalaya clause. However caution needs to be exercised when Federal Law is applicable as in essence Canada is a ‘mixed jurisdiction,’ as far as the provinces are concerned. The conclusion which has been reached by commentators is that the Himalaya clause, in particular in maritime matters, allows third parties amongst other things to enjoy the package limitation and the one-year delay for suit of the Hague-Visby Rules, as well as bestowing on third parties the same rights that a vessel owner has under the law. However, Tetley argued that the cost of abandoning the Privity rule is that ‘the door is left open to incongruity, abuse and, at times, injustice to persons who have contracted in good faith’.<sup>424</sup>

The point is that extending the protection to third parties arguably has the effect that parties who were never in the shipper’s contemplation have the same rights as contractual parties. Conversely of course a shipper ought to know that independent contractors are parties to the supply chain and the bill of lading reflects this fact.

### 1 *Statutory Solution*

As noted above the Hague-Visby Rules or amended Hague rules do not offer any protection to independent contractors. Protection is

---

<sup>422</sup> [1979] Carswel Nat 37.

<sup>423</sup> Ibid 518 [2] (Marceau J).

<sup>424</sup> Tetley, above n 47, 40.

limited to servant and agents of the carrier under contract and tort.<sup>425</sup> For completion sake a brief comment will be made in relation to the Hamburg and Rotterdam Rules. They are not yet ratified by important maritime nations and are of little significance at this stage.

(a) *The Hamburg Rules*

The Hamburg rules provide the same protection but the only variation is that the rules do not specifically exclude independent contractors.<sup>426</sup> The position of the independent contractor therefore is not clear. Article I(2) defines 'Actual carrier' as meaning 'any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted'.<sup>427</sup> This leads to the suggestion that any third party could potentially be included in the definition of carrier.

However, the Hamburg Rules do make a distinction between an actual carrier and carrier under art X which notes:

1. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.
2. All the provisions of this Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. The provisions of paragraphs 2 and 3 of Article 7 and of paragraph 2 of Article 8 apply if an action is brought against a servant or agent of the actual carrier.

---

<sup>425</sup> Hague-Visby Rules art IV(1), art IV(2).

<sup>426</sup> Hamburg Rules art VII(2).

<sup>427</sup> Hamburg Rules art I(2).

It will be of interest to discover how courts will apply the Hamburg Rules in connection to the protection of third parties. Though 34 countries have ratified the Hamburg Rules none of the important shipping countries are party to the Rules.

(b) *The Rotterdam Rules*

The latest convention The Rotterdam Rules in art 1(6) introduced the term ‘performing party’ which appears to be broad enough to include the independent contractors. Article 1.7 states:

Maritime performing party means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship.

Importantly the obligation is not centred on the carrier but the goods that is the performing party is responsible for the goods before the carrier arrives or departs from the docks. In essence anybody within the supply chain that is dock to dock is a performing party. Hence no distinction is drawn between the contractual parties and the independent contractors. To that end, art 18 notes:

Liability of the carrier for other persons:

The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

- a. Any performing party;
- b. The master or crew of the ship;
- c. Employees of the carrier or a performing party;  
or
- d. Any other person that performs or undertakes to perform any of the carrier’s obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.

Furthermore the period of responsibility of the carrier begins ‘when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered’.<sup>428</sup> As with the Hague-Visby rule the Rotterdam rules also included in art 59, a limit to the liability of the carriers. The limitation period of two years has also been preserved in art 62. It is noteworthy that Himalaya clauses may be redundant as arts 4.1 and 19.1 of the Rules provide remedies and limitations sought under the Himalaya clause. However, Himalaya clauses will not be rendered void pursuant to art 79 as they do not lessen any liability provided by the Rules.<sup>429</sup> In contrast, art 79 will render Circular Indemnity clauses void since they result in excluding the third parties from liabilities regulated by the Rules.<sup>430</sup>

## 2 *Contract (Right of Third Parties) Act 1999*

Where an English court is the correct the forum and and English law is applicable, the *Contract (Right of Third Parties) Act 1999* might be relevant. The issue is that third parties are not always able to rely on contractual protection and arguably ‘failing to give the third party rights prevents effect being given to the intentions of the contracting parties’.<sup>431</sup> The *Contract (Right of Third Parties) Act 1999* was enacted to overcome this difficulty.<sup>432</sup>

It must be noted that the Act does not preclude third parties from relying on rights or remedies arising from other means such as a Himalaya clause. Article 7(1) notes:

---

<sup>428</sup> Rotterdam Rules art 12(1).

<sup>429</sup> Theodora Nikaki, ‘Himalaya clauses and the Rotterdam Rules’ (2011) 17(1) *Journal of International Maritime Law* 20, 37.

<sup>430</sup> Richard Williams, *The Overall Impact of the Rotterdam Rules on the Liability of Multimodal Carriers and their Sub-contractors* (unpublished paper submitted to the Eighth Annual International Colloquium held by the Institute of International Shipping and Trade Law, Swansea University, 2013) 9.

<sup>431</sup> Robert Stevens, ‘The Contracts (Rights of Third Parties) Act 1999’ (2004) *Law Quarterly Review* 292, 292–323.

<sup>432</sup> Stephen Girvin, *Carriage of Goods by Sea* (Oxford University Press, 2<sup>nd</sup> ed 2011) 138.

## Supplementary provisions relating to third party:

3. Section 1 does not affect any right or remedy of a third party that exists or is available apart from this Act.

Furthermore, in the context of carriage of goods by sea contracts, Section 1 confers no rights on a third party in the case of:

- a. a contract for the carriage of goods by sea, or
- b. a contract for the carriage of goods by rail or road, or for the carriage of cargo by air, which is subject to the rules of the appropriate international transport convention.<sup>433</sup>

A third party may still prefer to rely on Himalaya clauses, appropriately drafted, which can confer to the plaintiff the intended benefits. If the third party intends to rely on the Act it is essential to state clearly that immunities are conferred to them<sup>434</sup> and that the third parties are identified in the contract.<sup>435</sup>

### 3 *Amending the Privity Rule*

Not surprisingly the issue of third party rights attracted the attention of parliaments. In civil law countries the right of third parties has been recognised for a long time. It must be noted that not unlike in common law countries the basis rule in civil law countries is that only parties to a contract can sue or be sued. Third party rights are the exception. As an example in Germany the BGB in art 328 regulates contracts which contain rights and obligations in favour of third parties. However the problem is that ‘from the outset, the Himalaya clause and stipulation for another are both conceptually and terminologically

---

<sup>433</sup> *Contract (Right of Third Parties) Act 1999* (UK) s 7(1).

<sup>434</sup> *Ibid* s 1(1).

<sup>435</sup> *Ibid* s 1(3).

incompatible'.<sup>436</sup> Tetley suggests three reasons why the Himalaya clause does not fall within the civilian third party stipulation.

Firstly, the Himalaya clause does not confer a direct benefit but rather a negative right, namely, a protection of being sued. Secondly, the third party is normally not determined and does not signify an assent as required in civil law legislations. Thirdly, 'a stipulation for another is an exception and must be interpreted restrictively'.<sup>437</sup> The Law Commission in the United Kingdom in 1996 presented a report which resulted in parliament passing the *Contracts (Rights of Third Parties) Act 1999*. Section 1 has overcome the problem as disused above in civil law legislations, noting in s 1:

Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if—

- a. the contract expressly provides that he may, or
  - b. subject to subsection (2), the term purports to confer a benefit on him.
2. Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.
  3. The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into...
  6. Where a term of a contract excludes or limits liability in relation to any matter references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation.<sup>438</sup>

Despite s 1(6) stating, to 'avail himself of exclusion or limitation of liability in such a contract' must be read in conjunction with s 6(5)(b) which states:

Section 1 confers no rights on a third party in the case of—  
a. a contract for the carriage of goods by sea, or

---

<sup>436</sup> Tetley, above n 47, 58.

<sup>437</sup> Ibid.

<sup>438</sup> *Contracts (Right of Third Parties) Act 1999* (UK) s 1.

- b. a contract for the carriage of goods by rail or road, or for the carriage of cargo by air, which is subject to the rules of the appropriate international transport convention, except that a third party may in reliance on that section avail himself of an exclusion or limitation of liability in such a contract.<sup>439</sup>

It is the exception listed in s 6(5)(b) which puts the Himalaya clause on a statutory footing in the UK, the Explanatory Note to section 6(5) states:

Subsection (5), which excludes certain contracts relating to the carriage of goods, nevertheless does not prevent a third party from taking advantage of a term excluding or limiting liability. In particular, this enables clauses which seek to extend an exclusion or limitation of liability of a carrier of goods by the sea to servants, agents and independent contractors engaged in the loading and unloading process to be enforced by those servants, agents or independent contractors (so called ‘Himalaya’ clauses).<sup>440</sup>

Arguably the *Contracts (Rights of Third Parties) Act 1999* was not suited to take the peculiarities of maritime issues into consideration as it tries to do all things for everybody and hence the exception to the exception had to be created. In essence, in England as well as in Australia arguably the *Act* is of no consequence and only reaffirms the uniqueness of maritime law. It will still be a judicial function to either further develop the Himalaya clauses or simply suggest that the law in this area is settled, which is unlikely. As a general comment the views of Hugh Beale give a good assessment of the utility of this *Act* in general. He noted:

While it is perhaps too soon to claim that the *Contracts (Rights of Third Parties) Act 1999* has been an outstanding success, in that as yet its use seems to be limited, I think we can say that it

---

<sup>439</sup> Ibid s 6(5)(b).

<sup>440</sup> Ibid s 6(26).

has certainly not been a failure. Rather I regard it as useful but still underused.<sup>441</sup>

In relation to the COGSA rules, the original Hague Rules (which originated as standard clauses found within bills of lading) fail to make any mention of the obligation held by the carrier to actually deliver goods. Therefore the need to draft clauses to cover the liability exemptions for all parties involved in the maritime adventure is important, specifically, to exactly list all third parties under a bill is important: taking note of the decision in *Norfolk Southern Railway Company v James N Kirby Pty Ltd*.<sup>442</sup>

The Rotterdam Rules appear to have overcome this problem under art 11, ‘the carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee’.<sup>443</sup> The Hamburg Rules solve the problem of the Himalaya clause at art 4, which extends the responsibility of the carrier from port to port, while art 10 holds the carrier responsible for the acts of the actual carrier, who by the definition in art 1(2), would include the stevedore and the terminal agent.<sup>444</sup> The problem with either the Hamburg rule as well as the Rotterdam rules is the slow uptake and hence change The Hague Visby rules as the dominant convention.

Courts have also redefined the privity rule, which has come under attack not only through the Himalaya clause, but in general specifically in insurance matters.<sup>445</sup> However, the privity rule has been and can be circumvented by persons seeking to take the benefits in a contract where they are a third party. The main circumstances

---

<sup>441</sup> Hugh Beale, ‘A Review of the Contracts (Rights of Third Parties) Act 1999’ in Burrows et al (eds), *Contract Formation and Parties* (2010) 225–50.

<sup>442</sup> 543 US 14; 125 SCt 385 (2004).

<sup>443</sup> Rotterdam Rules art 11.

<sup>444</sup> Tetley, above n 47, 64.

<sup>445</sup> *Canada River Pile & Dredge Ltd v Can-Dive Services Ltd* [1999] 3 SCR 108; [2000] 1 Lloyd’s Rep 199; *Trident General Insurance Co Ltd v McNiece Bros. Pty Ltd* (1988) 165 CLR 107.

applicable to shipping are firstly that the carrier has made the contract as agent of the third party. Secondly, the aggrieved party can claim under tort. It is still considered to be an artificial means to avoid the privity rule.

#### 4 Agency

In *Midland v Scruttons*, as noted above, Lord Reid suggested a four-stage test which has been adopted in other cases such as in *the New York Star*. The weak link in Lord Reid's theory is the question of consideration passing from the stevedore to the shipper. An answer was supplied in the *The Eurymedon*, namely, '[t]he performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the appellant (stevedore) should have the benefit of the exemptions and limitations contained in the bill of lading'.<sup>446</sup> This appears to be the law as it stands in the Commonwealth countries as confirmed in *The Rigoletto*.<sup>447</sup>

Professor Tetley is doubtful whether the considerations found by Lord Wilberforce for Lord Reid's agency theory and the presumed benefit to society and commerce because it promotes litigation based on technical points.<sup>448</sup> He based his view on the following paragraph by Lord Wilberforce in the *Eurymedon* (Emphasis added):

In the opinion of their Lordships, to give the appellant the benefit of the exemptions and limitations contained in the bill of lading is to give effect to the clear intentions of a commercial document, and can be given within existing principles. They see no reason to strain the law or the facts in order to defeat these intentions. It should not be overlooked that the effect of denying validity to the clause would be to encourage actions against servants, agents and independent contractors in order to get around exemptions (which are almost invariable and often compulsory) accepted by shippers against carriers, the existence,

---

<sup>446</sup> *The Eurymedon* [1975] AC 154, 159 (Lord Wilberforce).

<sup>447</sup> [2000] 2 Lloyd's Rep 532.

<sup>448</sup> Tetley, above n 47, 49.

and presumed efficacy, of which is reflected in the rates of freight. They see no attraction in this consequence.<sup>449</sup>

Tetley specifically argues that it is fallacious to state that ‘the clear intentions of a commercial document’ indicates that the benefit of an exemption clause can be given to third parties. It is true to say that third parties are able to hide their negligence behind a contract to which they are not a party, however, from a practical point of view, it is obvious that every shipper knows that a supply chain involves not only the contractual parties but others as well. Hence he understood the risk and that it is absolutely impossible, if at least not reasonable, to expect the shipper to either make several contracts with all concerned parties or the carrier will ask the shippers to enter into various contracts in order that any damage to cargo is covered by a contractual clause.

It is commercially far easier to have one contract and refine perhaps the Himalaya clause. This clause should be well known to any shipper and they should be aware of its consequences. The Canadian exception of gross negligence may present a solution. Importantly many judgments deal with the limitation period and/or package limitations as regulated in COGSA, both issues which a shipper can easily overcome by diligent behaviour or by simply taking out insurance.

### *5 Further development of Himalaya clauses*

Since *Adler v Dickson*, the drafters of exemption clauses have taken note of court decisions and have refined the wording. Third parties normally are involved only outside the tackle to tackle period which is protected by COGSA and hence ‘a period of responsibility clause’ can be of value. Such clauses are often integrated into the paramount clause and may read:

The provisions stated in said Act [i.e. COGSA] ... shall govern before the goods are loaded on and after they are discharged

---

<sup>449</sup> *The Eurymedon* [1975] AC 154, 169 (Lord Wilberforce).

from the ship and throughout the entire time the goods are in the custody of the carrier.<sup>450</sup>

A further possibility is that carriers include stevedores and terminal operators as a party to the bill of lading or the carrier acts as an agent for third parties. However, this is not a practical solution as the carrier does not wish to extend his period of responsibility nor be responsible for a third party. What can be said though is that carriers, stevedores and terminal operators, as a rule, do know each other and the reluctance of including third parties into the contract is not, as Treitel suggested, just a fiction.<sup>451</sup>

(a) *Circular indemnity clause*

The Circular Indemnity clause was invented to overcome the ‘uncertainty about the effectiveness of the Himalaya Clause’.<sup>452</sup> It allows a third party to sue for ‘the benefit of the agreement’ which was developed in *Beswick v Beswick*.<sup>453</sup> An agreement was made between two people whereby a business was sold and the seller was to be given a sum of money as a consultant for the rest of his life and in clause 2 of the same agreement the buyer agreed to pay a sum of money to the seller’s wife after his death.<sup>454</sup> The point was that the widow was not a party to the contract and hence the principle, as in *Tweddle*, should stand. However, it was observed that:

If there had been such a fundamental change in the law, the effect of which was to overrule *Tweddle v Atkinson* by statute the House of Lords in *Scruttons Ltd v Midland Silicones Ltd* could not have shut its eyes to such a point as this, and the only

---

<sup>450</sup> *Insurance Company of North America v M/V Savannah* (1999) AMC 1029 (SD NY 1997).

<sup>451</sup> Treitel, above n 363, 7.

<sup>452</sup> Robert Newell, ‘Privity fundamentalism and the circular indemnity clause’ (1992) 1 *Lloyd’s Maritime and Commercial Law Quarterly* 97, 97.

<sup>453</sup> [1968] AC 58.

<sup>454</sup> *Ibid* 59 (Lord Reid, Lord Hodson, Lord Guest, Lord Pearce and Lord Upjohn).

inference to be drawn from that case is that... [it] was rejected by them.<sup>455</sup>

Circular indemnity clauses have been introduced into bills of lading, and hence as part of Himalaya clauses, in the seminal case of the *The Elbe Maru*. A typical indemnity clause would read as follows:

The Merchant undertakes that no claim or allegation shall be made against any servant, agent or subcontractor of the Carrier which imposes or attempts to impose upon any of them or any vessel owned by any of them any liability whatsoever in connection with the goods and, if any such claim or allegation should nevertheless be made, to indemnify the Carrier against all consequences thereof.<sup>456</sup>

Simply put, the clause creates a chain of indemnity.<sup>457</sup> When an independent party is sued by the shipper or endorsee, there are two possible outcomes; the carrier may ask the court for a stay as noted in the jurisprudence above, or he may indemnify the third party and then bring an action against the cargo owner for breach of contract to recover the amount he has indemnified the third party.<sup>458</sup> As noted in the English and Australian jurisprudence, the shipper does promise not to sue any third parties within the supply chain.<sup>459</sup> Any action against a third party results in a stay of proceedings subject to the

---

<sup>455</sup> Ibid 69 (Lord Reid, Lord Hodson, Lord Guest, Lord Pearce and Lord Upjohn).

<sup>456</sup> *Nippon Yusen Kaisha v International Import and Export Co* [1978] 1 Lloyd's Rep 206, 207 (Ackner J).

<sup>457</sup> John F Wilson, *Carriage of Goods by Sea* (Harlow: Longman, 7<sup>th</sup> ed, 2010) 257.

<sup>458</sup> Nicholas Gaskell et al, *Bills of Lading: Law and Contracts* (London: LLP, 2000) 397.

<sup>459</sup> Many other jurisdictions have also approved of the indemnity clause such as *The Nedlloyd Colombo* [1998] 2 HKLR 53, 60 (Hong Kong CA); *Vander Limited v P & O Nedlloyd B.V.*, [1998] HKEC 928 (Hong Kong HC); 78 (2004) 267 FTR 115 [37] (Federal Court of Canada per Morneau P.); [2005] 4 FCR 441 (Federal Court of Canada). The clause was also upheld in *Bombardier Inc. v Canadian Pacific Ltd*, [1988] OJ No. 1807 (Ontaria HC); (1991) 7 OR (3d) 559 (Ontario CA).

requirements by the courts that the carrier has sufficient interest in the enforcement of the covenant.<sup>460</sup> ‘Sufficient interest’ has been defined as exposing the carrier, who is protected by the Himalaya clause anyway, to legal liability to the third party. The relevant clause reads that the carrier promised to ‘indemnify the third party against any amount which the cargo-owner might recover from the third party’.<sup>461</sup>

The issue which occupied the courts was whether the indemnity clause is in breach of art III r 8 of Hague Rules and the Hague-Visby Rules. The Court in the *Whitesea Shipping and Trading Corp & Anor v El Paso Rio Clara Ltda & Ors*<sup>462</sup> ruled that none of the third parties in the contract containing the indemnity clause undertook a sea carriage within the definition of the Hague-Visby Rules and hence the clause is not subject to art III Rule 8. However, in the *Neptune Orient Lines Ltd v JVC (UK) Ltd*<sup>463</sup> (*The Chevalier Roze*), it was clearly stated that circular indemnity clauses are inapplicable if the subcontractors perform any operation which is not within the scope of the bill of lading. The facts were that the goods were not collected after they were offloaded and further instruction went to the agent to deliver them to the consignee. The goods were lost on the transport. The question was whether the onward carriage was on the bill of lading terms. The Court decided it was not and hence the circular indemnity clause did not apply.<sup>464</sup> However, care must be taken when inserting a circular indemnity clause as under the newer conventions the result might be different.

Under the Hamburg Rules the situation is different. Article 10 expressly regulates liabilities of the actual carrier. The art states:

Liability of the carrier and actual carrier

1. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea

---

<sup>460</sup> See generally *Gore v Van der Lann* [1967] 2 QB 31.

<sup>461</sup> Treitel, above n 363, 469.

<sup>462</sup> [2009] 2 CLR 596.

<sup>463</sup> [1983] 2 Lloyd’s Rep 438.

<sup>464</sup> *Ibid* 443 (Parker J).

to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.

2. All the provisions of this Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him. The provisions of paragraphs 2 and 3 of Article 7 and of paragraph 2 of Article 8 apply if an action is brought against a servant or agent of the actual carrier.
3. Any special agreement under which the carrier assumes obligations not imposed by this Convention or waives rights conferred by this Convention affects the actual carrier only if agreed to by him expressly and in writing. Whether or not the actual carrier has so agreed, the carrier nevertheless remains bound by the obligations or waivers resulting from such special agreement.

Furthermore, art 23 must be read in conjunction with art 10. Article 23(1) also states:

Contractual stipulations

1. Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier, or any similar clause, is null and void.
3. Where a bill of lading or any other document evidencing the contract of carriage by sea is issued, it must contain a statement that the carriage is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee.

The effect of arts 10 and 23 is that a circular indemnity clause is mostly rendered void as it is in breach of the Hamburg Rules.

The Rotterdam Rules, as the Hamburg Rules, put doubt on the validity of the indemnity clause. Article 18 states that:

The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

- a. Any performing party.
- b. The master or crew of the ship
- c. Employees of the carrier or a performing party;  
or
- d. Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carriers' request or under the carrier's supervision or control.

In essence, third parties are not able to be sued as the carrier is directly responsible. Furthermore, art 79 states that any term in a contract of carriage is void if it directly or indirectly excludes or limits obligations of the carrier under this Convention. Under the Rotterdam rules the situation is changed if the contract stipulates a Free In, Out, Stowed and Trimmed (FIOS) term as described in *Jindal Iron and Steel Co Limited and others (Appellant) and others v Islamic Solidarity Shipping Company Jordan Inc*<sup>465</sup> ('*The Jordan II*'). Article 13(2) notes that the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. The effect of this article is that the stevedores are outside the carriage contract and are not a maritime performing party, hence, the indemnity clause is enlivened again.<sup>466</sup>

However, under the Hague-Visby rule this term is not an automatic exclusion of liability as the terms. Specifically, the word 'free' needs

---

<sup>465</sup> [2003] Lloyd's Rep 87.

<sup>466</sup> Richard Williams, 'The Rotterdam Rules: Winners and Losers' (2010) 16 *Journal of International Maritime Law* 191, 199.

interpreting within the context of the contract. In *the Jordan II* the Court noted:

There are three facets of the cargo operation which have to be considered. Who is to pay for it; who is to carry it out; and who is liable for it not being done properly and carefully? ... There is no presumption that each of these responsibilities should fall on the same party. In other words, if the charterer has agreed to pay for the cargo operation, there is no presumption that he has also agreed to carry it out or be liable if it is done badly.<sup>467</sup>

Lord Justice Tuckey made a clear distinction between paying for a service and being liable for it. The word 'Free' therefore does not mean free of risk it simply means free of cost as the FIOST term is simply a 'who is to pay' provision.<sup>468</sup> The questions whether the charterer (in this case) can be exempt from liability was discussed and it was held that:

Nothing would prevent the shipowner making a contract with the shipper on terms that the shipper would be responsible for loading, the receiver would be responsible for discharging and the shipowner responsible for neither... The Hague-Visby Rule art III r 2 simply compelled the shipowner to load and unload properly if he undertook these functions.<sup>469</sup>

However, clauses 7 and 17 relieved the shipowner from any responsibility unless the shipowner had intervened which he did not. The circular indemnity cl on its own has many disadvantages. As decided in *The Elbe Maru* the proceedings were a waste of time and costs by stating that:

If the action ought not to be brought, then the court should intervene and stop it rather than allow a series of circuitous actions which ultimately end up achieving exactly what the stay

---

<sup>467</sup> *The Jordan II* [2003] Lloyd's Rep 87, 103 (Lord Bingham).

<sup>468</sup> Ibid.

<sup>469</sup> Ibid 88 (Lord Bingham).

sought would achieve, apart from the disbursement of a quite unnecessary amount of costs.<sup>470</sup>

In any case the carrier is the only person who is entitled to enforce the clause in the head bill of lading: the third parties are not entitled since they are not the party to the contract. The issue is that the carrier needs to co-operate in the litigation.<sup>471</sup> In recent times many carriers have combined the Himalaya clause with Prohibition of Suit Clause and a Circular Indemnity Clause, in their standard form bills of lading.<sup>472</sup> In Canada, for example, this development has been noted in *Timberwest Forest Corp v Pacific Link Ocean Services Corp*.<sup>473</sup> Justice Harrington noted:

In maritime matters, the courts have always frowned upon efforts to avoid exemption and limitation clauses by suing the opposite party's servants, agents and subcontractors. Apart from the Himalaya Clause, maritime law has also developed forbearance of suit and circular indemnity clauses by which the shipper promises not to sue subcontractors and if anyone else does, to fully indemnify the carrier. These clauses were upheld in England in *Nippon Yusen Kaisha v "Elbe Maru"* (The) (1977), [1978] 1 Lloyd's Rep 206 (Eng Comm Ct). The circular indemnity clause was upheld by Mr Justice Chadwick of the Supreme Court of Ontario in *Bombardier Inc v Canadian Pacific Ltd*, [1988] OJ No. 1807 (Ont. HC). More recently, Prothonotary Morneau upheld the forbearance of suit clause in *Ford Aquitaine Industries SAS c "Canmar Pride"* (The), 2004 FC 1437, 267 FTR 115 (Eng), [2004] FCJ No. 1743 (FC). Extending insurance benefits to subcontractors, by express wording, or at least by necessary implication, is well known in the construction industry

---

<sup>470</sup> *Nippon Yusen Kaisha v International Import and Export Co (The Elbe Maru)* [1978] 1 Lloyd's Rep 206, 210 (Ackner J).

<sup>471</sup> Treitel, above n 363, 468.

<sup>472</sup> Peter G. Pamel and Robert C. Wilkins Borden Ladner Gervais LLP, 'Bills of Lading vs Sea Waybills, and The Himalaya Clause' (speech delivered at the NJI/CMLA, Federal Court and Federal Court of Appeal Canadian Maritime Law Association Seminar, Fairmont Château Laurier, Ottawa, April 15, 2011) 21.

<sup>473</sup> *Timberwest Forest Corp v Pacific Link Ocean Services Corp* (2008) FC 801; [2009] 4 FCR 496 (Federal Court of Canada).

*(Commonwealth Construction Co v Imperial Oil Ltd (1976), [1978] 1 SCR 317 (SCC)).*<sup>474</sup>

This ruling is a good example to bring the Himalaya clause and the circular indemnity clause into focus. This is so that as the 'rules are evolving, the carrier must be expressly or by implication instructed in some other contract (e.g. the stevedoring contract or the terminal operating agreement) to contractually benefit the third parties contemplated'.<sup>475</sup>

Tetley argues that if a circular indemnity clause is valid - and it is as the section above has shown - this would be a good reason to adopt the Hamburg Rules.<sup>476</sup> However this is neither a convincing reason nor a sufficient reason for a ratification of the Hamburg Rules. As at the end of 2014, 34 countries, mainly developing ones, adopted the Rules. Arguably therefore the Hague-Visby rules are still the predominant and most important Rules. Simply put, the Himalaya clause is here to stay for better or worse. At least it can be said that the Himalaya clause is an example where courts and legislations can develop an international uniform rule without the assistance of an international body like UNCITRAL.

## IX CONCLUSION

### *A Outline*

This section will compare the BIMCO clause (The Baltic and International Maritime Council) with other developments in exemption clauses which include third parties. It will conclude with the observation that the Privity rule is not applicable in shipping contracts as the Himalaya clause and other possible clauses have been firmly established. The principle of the privity rule has become irrelevant if the contract has been properly drawn up.

---

<sup>474</sup> Ibid [69] (Décary, Sharlow and Ryer JJA).

<sup>475</sup> Pamel and Gervais LLP, above n 471, 23.

<sup>476</sup> Tetley, above n 47, 57.

The reason the BIMCO clause has been chosen is due to the fact the Baltic and International Maritime Council is the largest international shipping association representing shipowners. It is therefore obvious that most shipowners would include the BIMCO clause into their contracts. The updated clause notes:

- a. For the purposes of this contract, the term “Servant” shall include the owners, managers, and operators of vessels (other than the Carrier); underlying carriers; stevedores and terminal operators; and any direct or indirect servant, agent, or subcontractor (including their own subcontractors), or any other party employed by or on behalf of the Carrier, or whose services or equipment have been used to perform this contract whether in direct contractual privity with the Carrier or not.
- b. It is hereby expressly agreed that no Servant shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee, receiver, holder, or other party to this contract (hereinafter termed “Merchant”) for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on the Servant’s part while acting in the course of or in connection with the performance of this contract.
- c. Without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty contained herein (other than Art III Rule 8 of the Hague/Hague-Visby Rules if incorporated herein) and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder including the right to enforce any jurisdiction or arbitration provision contained herein shall also be available and shall extend to every such Servant of the carrier, who shall be entitled to enforce the same against the Merchant.
- d.
  - i. The Merchant undertakes that no claim or allegation whether arising in contract, bailment, tort or otherwise shall be made against any Servant of the carrier which imposes or attempts to impose upon any of them or any vessel owned or chartered by any of them any liability whatsoever in connection with this contract

- whether or not arising out of negligence on the part of such Servant. The Servant shall also be entitled to enforce the foregoing covenant against the Merchant; and
- ii. The Merchant undertakes that if any such claim or allegation should nevertheless be made, he will indemnify the carrier against all consequences thereof.
  - e. For the purpose of sub-paragraphs (a)-(d) of this clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons mentioned in sub-clause (a) above who are his Servant and all such persons shall to this extent be or be deemed to be parties to this contract.

### B Discussion

Clause (a) sets out the parties which are included into the contract of carriage and is wide enough to overcome any doubt that in essence any person, servant or otherwise who performs any part in the carriage of goods between the shipper and the ultimate receiver of the goods is protected under the clause. It leaves no doubt that the Privity of contract rule is no longer of any consequence specifically as the clause notes 'whether in direct contractual privity with the Carrier or not'.<sup>477</sup>

Clauses (b) and (c) clearly set out the Himalaya clause as it currently stands. Clause (d) is a circular indemnity clause in essence relying on the successful clause contained in the attempt by the *The Elbe Maru*<sup>478</sup> as set out above. In addition, clause (e) covers all possible gaps in case a court deems the carrier to be an agent or any other possible relationships between the carrier and the Servants are deemed to be possible. The clause indicates that all third parties are deemed to be a contractual party of the carrier.

Simply put, the BIMCO clause covers all eventualities which might occur in a maritime venture between the carrier and the seller or any other person who has contracted with the carrier to have goods

---

<sup>477</sup> Ibid.

<sup>478</sup> *Nippon Yusen Kaisha v International Import and Export Co (The Elbe Maru)* [1978] 1 Lloyd's Rep 206, 207 (Ackner J).

shipped. In addition, the clause also assumes that the Hague/Hague-Visby Rules are incorporated. It is obvious that the BIMCO clause needs to be adjusted in case the Hamburg or Rotterdam rules are applicable. Especially if the Rotterdam rules are the governing convention in light of the above discussion, the clause might need to be adjusted in case of duplication which could create inconsistencies.

A further interesting point is how the clause would stand up when Canadian law governs the contract. As noted in section X, Canada does not support or give force to a Himalaya clause if the act can be defined to fall under the principle of gross negligence (*faute lourde*) which is part of Canadian public policy and hence will overrule contractual clauses.

Tetley did note that the Himalaya clause has gone too far by allowing third parties to be careless as they understand the effect of the Himalaya clause will give protection irrespective of the gravity of their negligence. He noted that ‘allowing stevedores and terminal operators to completely limit their liability, ignores the fact that in the commercial world it is preferable for persons who cause damage to cargo to be held responsible for that damage’.<sup>479</sup> He further notes that:

Lord Goff seems to have missed this point. Reviewing prior Himalaya clause jurisprudence, he said in a confusing declaration: “In more recent years the pendulum of judicial opinion has swung back again, as recognition has been given to the undesirability, especially in a commercial context, of allowing plaintiffs to circumvent contractual exception clauses by suing in particular the servant or agent of the contracting party who caused the relevant damage, thereby undermining the purpose of the exception, and so redistributing the contractual allocation of risk which is reflected in the freight rate and in the parties’ respective insurance arrangements.”<sup>480</sup>

On the other hand, it could be argued that gross negligence is not as prevalent as one might assume as most businesses would consider

---

<sup>479</sup> Tetley, above n 47, 44.

<sup>480</sup> Ibid relying on the *The Mahkutai* [1996] AC 650, 661 (Lord Goff) (emphasis added).

reputation to be of importance and hence will try to fulfil their contractual obligations. Furthermore, the Himalaya clause, as extended to its fullest, will protect all participants in a marine venture and any shipper or owner of goods simply relies on insurance for protection. In essence the question is simply 'are we sufficiently protected by insurance' as it is obvious that carriers and third parties are protected by the Himalaya clause. As far as insurance is concerned Tetley is adamant that due to the protection of third parties though Himalaya clauses insurance has become more expensive as noted above.

### *C Concluding Remarks*

This article has traced the development of the Himalaya clause in various jurisdiction. It has been found that in maritime ventures the Privity rule has been replaced gradually over time, as with every ruling 'holes' in the clauses have been discovered which have subsequently lead to a redrafting of the clause. In addition to the development of the Himalaya clause new clauses such as the circular indemnity clause were found to be of assistance in extending protection to all those involved in the carriage of goods. Furthermore, the Himalaya clause has been recognized as reflecting business practices. No doubt any shipper will understand that the carrier will employ third parties to assist in the delivery of goods to the final destination, hence, it makes sense that third parties ought to be protected as it is contemplated by all parties that non contractual parties will, by necessity, be employed or used by a carrier.

Most importantly, the Himalaya clause can be described as law reform. This is evidenced by the fact that the clause has found its way into most if not all jurisdictions associated with maritime adventures. This article has also shown that transnational law reform is not always driven by international bodies but can be equally developed by national courts which in a particular industry like shipping can permeate other jurisdiction and hence lead to a global uniform approach spanning the civil and common law world.

## **COST AND BURDEN OF PROOF UNDER THE CISG – A DISCUSSION AMONGST EXPERTS**

STEFAN KRÖLL, LARRY DIMATTEO, ULRICH G. SCHROETER, ANDRÉ  
JANSSEN AND CAMILLA BAASCH ANDERSEN\*

### **Abstract**

*CISG — Cost — Burden of Proof — 23<sup>rd</sup> Willem C Vis Arbitration Moot — International Dispute Resolution — Arbitration — Substantive Law — Procedural Law — Common Law — Civil Law — United States of America Jurisdiction — German Jurisdiction*

*This article discusses the relationship between costs and burden of proof under the CISG and the continual debate between diverging views across jurisdictions on the topics. It conveys the significance of the issues in dispute resolution, which is supported in particular by key arbitration decisions. In addition, the article describes the relevance of the issue in both substantive and procedural law, emphasising the contrasting perspectives of the United States of America ('US') and Germany through significant case law and deliberation.*

### **I INTRODUCTION (STEFAN KRÖLL)**

At first sight, it appears strange to combine the topics of burden of proof and costs under the CISG in one discussion. A closer look reveals however, that there are more similarities between them than merely having been a part of the problem for the 23<sup>rd</sup> Willem C Vis Arbitration Moot ('Vis problem'). First, both topics are of

---

\* Larry A. DiMatteo, Huber Hurst Professor of Contract Law & Legal Studies, University of Florida; Ulrich G Schroeter, Professor of Law, University of Mannheim; Stefan Kröll, Director of the Vis Moot, Honorary Professor Bucerius Law School, Hamburg; Professor Camilla Baasch Andersen, Professor and Director of Higher Degrees (Research) University of Western Australia; André Janssen, Associate Professor, City University of Hong Kong Law School.

considerable practical importance in international dispute resolution, in particular, arbitration. Second, both topics concern the intersection of substantive and procedural law. Third, there still seems to be a common law/civil law divide, or to be more precise a US/Germany divide, in the treatment of these problems.

### *A The Practical Relevance of the Topics*

The practical importance of both topics is often underestimated, not only by students, but also by parties.<sup>1</sup> In law school, the discussion normally concerns which legal principles apply to a particular case. In practice however, the cases frequently turn more on the facts than on the law. The applicable legal principles are clear; the primary issue is how to prove the facts are necessary for their application. Documents, and in particular required signed versions of them, may have been lost, witnesses may no longer be available, or the parties may, for other reasons, have no access to the evidence needed. If the remaining evidence is not sufficient for the tribunal or the court to form a view on what has happened with the required certainty, the question inevitably arises: which party bears the burden of proof for a particular fact?

The practical relevance of the cost question results from the fact that arbitration is by no means cheap, despite the cost advantages which might exist in comparison to court proceedings, at least if they involve several proceedings. An extreme example for this is *Brunswick Bowling & Billiards Corporation v Shanghai Zhonglu Industrial Co Ltd.*<sup>2</sup> According to the Hong Kong Court of Appeal, which rejected the request to set aside the award, both parties spent more than US\$10 million for an arbitration which resulted in an award ordering the respondent to pay US\$89,106.10 with interest and to return 2,000

---

<sup>1</sup> See, for the lack of substantive pleadings of the parties on the question of costs, John Y Gotanda, 'Bringing Efficiency to the Awarding of Fees and Costs in International Arbitration' in Stefan Michael Kröll et al (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International, 2011) 141–42.

<sup>2</sup> [2009] HKCFI 94; [2011] HKLRD 707.

bowling balls.<sup>3</sup> An issue generally found in arbitration is that costs escalate even beyond such extreme cases as this one, which is well evidenced by criticism raised by users<sup>4</sup> and the various initiatives taken by institutions to curb costs. The International Chamber of Commerce ('ICC') for example has issued a number of guidelines in its brochure on how to avoid costs and delay in arbitration.<sup>5</sup>

### *B Intersection Between Procedural Law and Substantive Law*

The second common feature is that they are located at the borderline of procedural law and substantive law. In the majority of cases, costs are determined by arbitral tribunals on the basis of guidelines contained in procedural rules. These are often the applicable arbitration rules or – primarily in ad hoc arbitration – the applicable national arbitration law.<sup>6</sup> Typical for the content of such rules is art 37 of the ICC Arbitration Rules. It provides under the heading 'Decisions as to the Cost of the Arbitration' in the relevant paragraphs 3–5 that:

3. At any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs, other than those to be fixed by the Court, and order payment.
4. The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.
5. In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has

---

<sup>3</sup> Ibid.

<sup>4</sup> See Paul Hobeck, Volker Mahnken and Max Koebke, 'Time for Woolf Reforms in International Construction Arbitration' [2008] 11(2) *International Arbitration Law Review* 84.

<sup>5</sup> International Chamber of Commerce Arbitration Commission, 'Report on Techniques for Controlling Time and Costs in Arbitration' (Report 861–1, International Chamber of Commerce Arbitration Commission, 2012).

<sup>6</sup> See for example, *German Code of Civil Procedure* § 1057.

conducted the arbitration in an expeditious and cost-effective manner.<sup>7</sup>

In particular, where the guiding principle of cost allocation is a ‘costs-follow-the-event’ approach, the flipside of these rules and laws granting procedural powers to the tribunal, is a claim by the winning party – based on procedural law – to be reimbursed for costs incurred. In the end, it is for each tribunal to allocate the costs incurred during the arbitration or in connection with the underlying dispute. The rules applicable in arbitral proceedings regulate not only the allocation of the costs but also which costs are required to be reimbursed. At the same time, they normally provide much more flexibility to the tribunal than a court has in litigation, where the rules are often drafted with purely domestic cases in mind. In light of that, and the greater complexity of the disputes resulting later in international arbitral proceedings, the parties often ask for the reimbursement of costs which go beyond those legal fees incurred directly from the arbitral proceedings.

That may involve not only costs incurred before the arbitral proceedings were initiated when the parties tried to settle their case amicably, but also costs incurred in actions before the State courts either for interim relief or to make arbitration proceedings possible at all. In particular, in the latter cases, the question arises whether such costs can be reimbursed in the arbitral proceedings in so far as they have not been reimbursed in the court proceedings. These costs may be either closely connected to proceedings or, having been spent in actions without which the proceedings may not have been possible, necessary or reasonable for the proper pursuit of a case.

At the same time, the cost incurred for the proceedings are also a direct consequence of the other party’s breach of contract.<sup>8</sup> The question which arises is how these two different claims are connected with each other; in particular, whether the substantive claim is pre-

---

<sup>7</sup> International Chamber of Commerce, *International Court of Arbitration Arbitration Rules Mediation Rules* (2013) [3]–[5].

<sup>8</sup> José Rosell, ‘Arbitration Costs as Relief and/or Damage’ (2011) 28 *Journal of International Arbitration* 115, 116.

empted by the procedural rules or vice versa. Equally, the question of burden of proof may involve both substantive and procedural elements. That is well evidenced by the Italian decision of the Tribunale di Vigevano [District Court Vigevano] in *Rheinland Versicherungen v Atlarex*.<sup>9</sup>

There, the Court came to the conclusion that the question of burden of proof for the non-conformity of the goods was a question of substantive law, as it was so closely related to the substantive claim. Consequently, the question to be considered was governed by the CISG. At the same time, the Court submitted the question: by which evidentiary means could the buyer discharge its burden pursuant to Italian law? This issue was considered to be procedural and therefore governed by the *lex fori*. The question as to which law governs the standard of proof was not addressed explicitly, despite its relevance and connection with the question of which party bears the burden of proof.

At the same time, the need for sophisticated rules on the burden of proof depends to a certain extent on what access parties have to evidence. Where a party can obtain all the evidence it needs, on the basis of procedural rules allowing for discovery, there is less need to think about whether it is appropriate to impose the burden of proof upon it.<sup>10</sup>

### *C Common Law – Civil Law Divide*

The third common feature, closely related to the second, is that there still seems to be a divide between common law and civil law. That is

---

<sup>9</sup> *Rheinland Versicherungen v Atlarex*, Tribunale di Vigevano (District Court Vigevano), No 405, 12 July 2000 reported in (2001) 20 *Journal of Law and Commerce* 209, 218–21.

<sup>10</sup> For the interaction between the rules on taking evidence in procedural law and the question of burden of proof, which in the majority of jurisdictions is considered to be a rule of substantive law, see Rolf Trittman, ‘The Interplay Between Procedural and Substantive Law in International Arbitration’ (2016) *SchiedsVZ German Arbitration Journal* 7.

well reflected by the following discussion and the case law presented therein. There may be several different reasons for that, starting from the thinking in remedies or claims over different approaches to statutory interpretation, to a generally different attitude to an extensive interpretation of the CISG. Last but not least, differences in procedural law may contribute to the different approaches.

II BURDEN OF PROOF: GOVERNED BY THE CISG  
(ULRICH SCHROETER)

Although I personally hold a more sceptical view about this issue,<sup>11</sup> I will (in the following) try to describe what has often been referred to as the ‘majority view’<sup>12</sup> under the CISG, namely that the Convention governs the allocation of the burden of proof,<sup>13</sup> and exhaustively at

---

<sup>11</sup> See Peter Schlechtriem and Ulrich G Schroeter, *Internationales UN-Kaufrecht*, (Mohr Siebeck, 5<sup>th</sup> ed, 2013) 100.

<sup>12</sup> Milena Djordjevic, ‘Article 4’ in Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN-Convention on Contracts for the International Sales of Goods (CISG)* (Verlag CH Beck oHG and Hart Publishing, 2011) 62 [34]; Franco Ferrari, ‘Burden of Proof under the CISG’, (2000–01) *Review of the Convention on Contracts for the International Sale of Goods (CISG)* 1.

<sup>13</sup> Oberster Gerichtshof [Austrian Supreme Court], CISG-online No 1364, 12 September 2006; Bundesgerichtshof [German Federal Supreme Court], CISG-online No 651, 9 January 2002 reported in (2002) *Neue Juristische Wochenschrift* 1651; Bundesgerichtshof [German Federal Supreme Court], CISG-online No 847, 30 June 2004 reported in (2004) *Neue Juristische Wochenschrift* 3181; *Rheinland Versicherungen v Atlarex*, Tribunale di Vigevano (District Court Vigevano), No 405 12 July 2000 reported in (2001) 20 *Journal of Law and Commerce* 209, 218–21; Djordjevic, above n 12, 62; Franco Ferrari, ‘Article 4’ in Peter Schlechtriem and Ingeborg Schwenzer (eds), *Kommentar zum Einheitlichen UN-Kaufrecht – CISG –* (C.H. Beck, 6<sup>th</sup> ed, 2013) 127; Franco Ferrari, ‘Burden of Proof under the CISG’ (2000-01) *Review of the Convention on Contracts for the International Sale of Goods (CISG)* 1; Stefan Kröll, ‘The Burden of Proof for the Non-Conformity of Goods under Art 35 CISG,’ (2011) *LIX Belgrade Law Review* 162, 168; Ulrich Magnus, ‘Wiener UN-Kaufrecht (CISG)’ in J von Staudinger (ed), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*

that.<sup>14</sup> Whether the same applies to the standard of proof is yet another matter that will not be covered here.<sup>15</sup>

#### *A CISG Provisions Explicitly Addressing the Burden of Proof*

The CISG contains a number of provisions that explicitly address the allocation of the burden of proof. Among them, the clearest one is art 79(1) of the CISG, which provides that '[a] party is not liable for a failure to perform any of his obligations *if he proves* that the failure was due to an impediment beyond his control'.<sup>16</sup> In addition, a number of other CISG provisions address the burden of proof for certain of the prerequisites contained therein through the term 'unless...'. An example is art 2(a), which provides that the CISG does not apply to sales of goods bought for personal, family or household use, 'unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use'.<sup>17</sup>

---

(2013), Art 4 [69]; Ingeborg Schwenzer and Pascal Hachem, 'Article 4' in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the Convention on the International Sale of Goods (CISG)*, (Oxford University Press, 4<sup>th</sup> ed, 2016) 68.

<sup>14</sup> See Bundesgerichtshof [German Federal Supreme Court], CISG-online No 651, 9 January 2002, reported in (2002) *Neue Juristische Wochenschrift* 1651: '...the CISG regulates the burden of proof [...], so that consequently, recourse to the national law is pre-empted to that extent'.

<sup>15</sup> See Kantonsgericht Nidwalden [District Court Nidwalden], CISG-online No 1086, 23 May 2005, reported in (2005) *Internationales Handelsrecht* 253, 254; Peter Schlechtriem and Ulrich G Schroeter, *Internationales UN-Kaufrecht* (Mohr Siebeck, 5<sup>th</sup> ed, 2013) 101: standard of proof is not governed by the CISG; contra Ingeborg Schwenzer, 'Article 74' in Ingeborg Schwenzer (ed), *Schlechtriem and Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)*, (Oxford University Press, 4<sup>th</sup> ed, 2016) 1085: standard of proof is governed by the CISG.

<sup>16</sup> Emphasis added.

<sup>17</sup> *United Nations Convention on Contracts for the International Sale of Goods ('CISG')*, opened for signature 11 April 1980, 19 ILM 668, (entered into force 1 January 1988) art 2(a).

It is commonly said that the wording of art 2(a) indicates that the party alleging that the seller neither knew nor ought to have known that the goods were bought for personal, family or household use bears the burden of proving this fact.<sup>18</sup> This understanding of the use of the term ‘unless’, which in the case of art 2(a) is supported by the provisions’ drafting history,<sup>19</sup> mirrors a classical civil law-style regulation of the burden of proof. It has therefore – maybe not surprisingly – found a particularly strong support among CISG commentators with a civil law background. Apart from art 2(a), other CISG provisions containing an ‘unless’ clause are arts 3(1), 9(2), 14(2), 18(2), 19(2), 21(2), 25(2), 27, 28, 33(b), 35(2), 39(2), 41, 46(1), 46(3), 47(2), 48(4), 49(2), 58(3), 62, 63(2), 64(2), 66 and 93(3), although its use

---

<sup>18</sup> John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, (Kluwer Law International, 3<sup>rd</sup> ed, 1999) 48; Ingeborg Schwenzer and Pascal Hachem, ‘Article 2’ in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the Convention on the International Sale of Goods (CISG)*, (Oxford University Press, 4<sup>th</sup> ed, 2016) 36; Frank Spohnheimer, ‘Article 2’ in Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN-Convention on Contracts for the International Sales of Goods (CISG)*, (Hart Publishing, 2011) 45.

<sup>19</sup> See the discussion of art 2(a) CISG within the ‘UNCITRAL Working Group’ in (1975), VI *UNCITRAL Yearbook* 49, 51 Nos. 25, 26: ‘It was also observed that in some legal systems the use of the word “if” as used in the text proposed by Working Party II would require the party relying on the “if” clause to prove that which was in the clause. In contrast, the use of the word “unless”, as in the text presented by the observer, would put the burden on the seller to prove his knowledge or lack of knowledge of the intended use of the goods. [...] The Working Group adopted the text proposed by the observer; see also the comments by delegate Ludvik Kopač, during the Vienna Diplomatic Conference, *United Nations Conference on Contracts for the International Sale of Goods*, UN GAOR, 39<sup>th</sup> Comm, 1<sup>st</sup> sess, UN Doc A/CONF.97/19 (10 March – 11 April 1980) 238: ‘He had no objection to the principle behind the paragraph but felt the wording could be improved. The crucial part of the provision was the clause beginning “unless the seller”... and in the form in which it was currently worded it implied that there was an obligation to prove an absence of knowledge that the goods were bought for personal, family or household use...’.

certainly does not in each case signify an allocation of the burden of proof.

Finally, art 35(2)(b) employs a similar expression:

Except where the parties have agreed otherwise, the goods do not conform with the contract unless they [...] are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement.<sup>20</sup>

It is widely accepted that the phrase 'except where the circumstances show that the buyer did not rely [...] on the seller's skill and judgement' imposes a burden of proof on the person arguing that fact.<sup>21</sup> Interestingly, this use of the term 'except where' appears only in art 35(2)(b) and nowhere else within the Convention.

#### *B General Principle on the Burden of Proof Allocation Underlying the CISG*

Against the background of the provisions just described, the current majority opinion under the CISG goes a step further by suggesting that the Convention is based on a general principle of the burden of proof allocation in the sense of art 7(2) of the CISG.<sup>22</sup> Accordingly,

---

<sup>20</sup> CISG, above n 17, art 35(2)(b).

<sup>21</sup> Harry M Flechtner, 'Moving Through Tradition Towards Universalism under the UN Sales Convention (CISG): Notice of Lack of Conformity (Article 39) and Burden of Proof in the Bundesgerichtshof Opinion of 30 June 2004' in Johan Erauw et al (eds), *Liber Memorialis Professor Petar Sarcevic* (Sellier European Law Publishers, 2006) 457, 467; Stefan Kröll, 'The Burden of Proof for the Non-Conformity of Goods under Art 35 CISG', (2011) *LIX Belgrade Law Review* 162, 176; Ingeborg Schwenzer, 'Article 35' in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the Convention on the International Sale of Goods (CISG)*, (Oxford University Press, 4<sup>th</sup> ed, 2016) 621.

<sup>22</sup> See the extensive references in Djordjevic, above n 12, [36]; Kröll above n 1, 168; Schwenzer and Hachem, above n 13, 68.

all questions arising with respect to the burden of proof under CISG contracts supposedly have to be answered in accordance with this general principle as well as in those cases where no explicit provisions listed above applies. Consequently, any recourse to domestic law relating to the burden of proof is forbidden.

According to the majority view, the CISG's underlying general principle on the burden of proof essentially has three prongs. First, that every party has to prove the facts on which its claim, right, or defence is based.<sup>23</sup> Second, that the party relying on an exception must prove this exception.<sup>24</sup> Third, in exceptional circumstances, considerations of equity – for example the notion of proximity of proof or unacceptable difficulties for one party to furnish evidence – can lead to a shifting of the burden of proof.<sup>25</sup> In other words, where facts are so closely connected to the sphere of one party that it is impossible for the counter-party to prove these facts, the burden of proof must be allocated or shifted to the first party.<sup>26</sup>

---

<sup>23</sup> Bundesgerichtshof [German Federal Supreme Court], CISG-online No 651, 9 January 2002 reported in (2002) *Neue Juristische Wochenschrift* 1651; Oberster Gerichtshof [Austrian Supreme Court], CISG-online No. 1364, 12 September 2006; Schwenger and Hachem, above n 13, 68.

<sup>24</sup> Bundesgerichtshof [German Federal Supreme Court], CISG-online No 847, 30 June 2004 reported in (2004) *Neue Juristische Wochenschrift* 3181.

<sup>25</sup> Bundesgerichtshof [German Federal Supreme Court], CISG-online No 847, 30 June 2004 reported in (2004) *Neue Juristische Wochenschrift* 3181; Oberster Gerichtshof [Austrian Supreme Court], CISG-online No. 1364, 12 September 2006; Franco Ferrari, 'Artikel 4' in Ingeborg Schwenger (ed), *Schlechtriem/Schwenger Kommentar zum Einheitlichen UN-Kaufrecht – CISG* – (C.H. Beck, 6th ed, 2013) 127; Franco Ferrari, 'Burden of Proof under the CISG', *Review of the Convention on Contracts for the International Sale of Goods (CISG)* [2000–01] 1; Ulrich Magnus, 'Wiener UN-Kaufrecht (CISG)' in J von Staudinger (ed), *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (Sellier/De Gruyter, 2013) art 4, 69.

<sup>26</sup> Schwenger and Hachem, above n 13, 68.

For such an overwhelming majority view, it is interesting that the reasons supporting this three-prong general principle seem surprisingly thin. As far as the wording of the CISG is concerned, art 79(1) CISG could be read as confirming the first prong, whereas art 2(a) CISG (and similar ‘unless...’ provisions) could confirm the second prong. However, in spite of these factors, it could as convincingly be argued that arts 79(1) and 2(a) CISG as well as similar provisions are superfluous if a general principle of the type described above is really underlying the CISG. This would leave the argument that the drafters of the CISG wanted to make sure that the burden of proof allocation could be easily discerned in instances in which this seemed particularly important to the drafters – however, there is only limited support in the *travaux préparatoires* for this assumption.<sup>27</sup>

Further, difficulties are highlighted by case law decided under the CISG, according to which the CISG’s burden of proof rules do not reach further than the Convention’s substantive scope as defined in art 4.<sup>28</sup> Accordingly, the question of whether, and possibly which, evidentiary consequences an actual admission of liability by one party has, is supposedly not governed by the CISG but by domestic law.<sup>29</sup> The limited scope of the CISG thereby opens a backdoor to a non-uniform treatment of matters that are arguably as closely related to the burden of proof and its discharge as the rules of substantive law.<sup>30</sup> An argument made by supporters of the prevailing view – namely, that the burden of proof is so closely connected with the application

---

<sup>27</sup> For references to the *travaux préparatoires* that indicate the contrary – namely that the drafters did *not* want to regulate the burden of proof through specific terms in CISG provisions – see Harry M Flechtner, ‘Selected Issues Relation to the CISG’s Sphere of Application’, (2009) 13 *Vindobona Journal of International Commercial Law and Arbitration* 91, 102–05.

<sup>28</sup> CISG, above n 17, art 4.

<sup>29</sup> Bundesgerichtshof [German Federal Supreme Court], CISG-online No 651, 9 January 2002 reported in (2002) *Neue Juristische Wochenschrift* 1651.

<sup>30</sup> Flechtner, above n 21, 104–05.

of the substantive provisions that it would be impracticable to separate the two – therefore sounds somewhat hollow.<sup>31</sup>

*C Shifting the Burden of Proof: A Decisive Test Case*

It is, however, the third prong that appears to be the most troublesome. It was used by the German Federal Supreme Court when applying art 40 of the CISG to a case in which the buyer argued that the seller was not entitled to rely on the lack of a notice of non-conformity by the buyer under art 39. This was because the lack of conformity of the goods (paprika powder) allegedly related to facts of which the seller knew or could not have been unaware of and which he did not disclose to the buyer.<sup>32</sup>

The burden of proof for the existence of such facts known to the seller would normally have been borne by the buyer however, under the general principle's second prong, the buyer relied on the exception of art 40. The Federal Supreme Court held that an exception to this rule may be necessary in individual cases under the notion of 'proof-proximity' (*Beweisnähe*) or if an evidentiary showing results in unreasonable difficulties of proof for the buyer.<sup>33</sup> In support of the principle's third prong thus created, the Court argued that it is recognised within the scope of the CISG 'that a strict application of the "exception-to-the-rule" principle can lead to inequities'.<sup>34</sup>

---

<sup>31</sup> Djordjevic, above n 12, 36; Kröll, above n 13, 169.

<sup>32</sup> Bundesgerichtshof [German Federal Supreme Court], CISG-online No 847, 30 June 2004 reported in (2004) *Neue Juristische Wochenschrift* 3181.

<sup>33</sup> Ibid.

<sup>34</sup> Bundesgerichtshof [German Federal Supreme Court], CISG-online No 847, 30 June 2004 reported in (2004) *Neue Juristische Wochenschrift* 3181.

Therefore, a correction is necessary according to the principles set forth herein',<sup>35</sup> but it remains that 'prudence is appropriate'.<sup>36</sup>

The Court further elaborated as follows:

The law allows for this aspect within the framework of Article 40 CISG in that it does not always demand proof of the seller's knowledge of the facts on which the contractual breach is based, but rather deems it sufficient that the seller 'could not have been unaware of' those facts; thus, Article 40 CISG also covers cases of negligent ignorance.<sup>37</sup> Under certain circumstances, the required proof can already be deduced from the type of defect itself so that, in the case of extreme deviations from the contractually agreed upon condition, gross negligence is assumed if the breach of contract occurred in the seller's domain.<sup>38</sup> According to the principles mentioned above, it may be necessary to limit the buyer's burden of proof in the case of a gross breach of contract and in view of the aspect of 'proof-

---

<sup>35</sup> The Federal Supreme Court refers to Gerhard Hepting, 'Vor Art 1 WKR' in Gottfried Baumgärtel & Hans-Willi Laumen (eds), *Handbuch der Beweislast im Privatrecht (Handbook on the Burden of Proof in Private Law)* (Carl Heymanns Verlag, 2<sup>nd</sup> ed, 1999) vol 2, 28–30; Magnus, above n 13, art 4 [69]; Ferrari, in *Schlechtriem/Schwenzer Kommentar zum Einheitlichen UN-Kaufrecht – CISG* – (C.H. Beck, 6th ed, 2013) 127.

<sup>36</sup> Bundesgerichtshof [German Federal Supreme Court], CISG-online No 847, 30 June 2004 reported in (2004) *Neue Juristische Wochenschrift* 3181.

<sup>37</sup> The Federal Supreme Court refers to Wilhelm-Albrecht Achilles, *Kommentar zum UN-Kaufrechtsübereinkommen* (2000), art 40 [1]; Alexander Lüderitz, 'Artikel 40 EKG' in Hans Theodor Soergel (ed), *Kommentar zum Bürgerlichen Gesetzbuch* (Kohlhammer, 12<sup>th</sup> ed, 1991), 1; Alexander Lüderitz and Dirk Schübler-Langeheine, 'Artikel 40 CISG' (Article 40 CISG) in Hans Theodor Soergel (ed), *Kommentar zum Bürgerlichen Gesetzbuch* (Kohlhammer, 13<sup>th</sup> ed, 2000) 1–2.

<sup>38</sup> The Federal Supreme Court refers to Wilhelm-Albrecht Achilles, *Kommentar zum UN-Kaufrechtsübereinkommen* (2000) art 40 [4]; Lüderitz, above n 37, 1; see also Lüderitz and Schübler-Langeheine, above n 37, 3; Magnus, above n 13, 13.

proximity' (*Beweisnähe*) in order to avoid unreasonable difficulties in providing proof.<sup>39</sup>

It is striking that the Federal Supreme Court, in resorting to the so-called *Beweisnähe*, used a legal concept developed under German civil law and applied it to the CISG<sup>40</sup> – an approach that is difficult to reconcile with both the regard to the CISG's international character and to the need to promote uniformity in its application, as called for in art 7(1). Assuming that the allocation of the burden of proof is a matter governed by the CISG (as the prevailing view believes), any shifting of this burden to the other party would have to be based on arguments drawn from the CISG itself. In this respect, one could think of an interpretation of the CISG's burden of proof rules in accordance with good faith in international trade<sup>41</sup> in cases in which a party is faced with unreasonable difficulties in providing the required evidence.

*D Arbitration Agreements as a Potential Derogation from the CISG's Burden of Proof Rules in art 6 of the CISG?*

Finally, it is useful to consider why the question of whether the CISG regulates the burden of proof, and thereby pre-empts domestic law (including 'procedural' law, however defined), may potentially not matter in cases where the parties have agreed to arbitration. The reason is housed in art 6, which gives the parties the right to derogate from or vary the effect of any of the CISG's provisions (with the exception of art 12), including the general principles underlying the CISG, in accordance with art 7(2). Such derogation may, according to the prevailing and convincing view, also occur implicitly.<sup>42</sup>

---

<sup>39</sup> Bundesgerichtshof [German Federal Supreme Court], CISG-online No 847, 30 June 2004 reported in (2004) *Neue Juristische Wochenschrift* 3181.

<sup>40</sup> See, eg, Flechtner, above n 21, 104–05; Kröll, above n 13, 168.

<sup>41</sup> CISG, above n 17, art 7(1).

<sup>42</sup> Cour de Cassation [French Court of Cassation], 99–12.87, 25 October 2005, CISG-online No 1226; Oberster Gerichtshof [Austrian Supreme Court], CISG-online No 828, 17 December 2003; Ingeborg Schwenzer and Pascal Hachem, 'Article 6' in Schlechtriem & Schwenzer,

Against this background, an arbitration agreement between the parties selecting arbitration rules which contain provisions on the burden of proof (for example, as in the UNCITRAL Arbitration Rules)<sup>43</sup> or on the taking of evidence by the arbitral tribunal (for example, as in the Vienna Arbitration Rules<sup>44</sup>) could potentially be read as a derogation from the CISG's burden of proof rules. Whether such a derogation was intended by the parties has to be determined on a case-by-case basis applying the interpretative standards of art 8 of the CISG. It remains a particularly interesting and challenging question which proof-related rules prevail in cases in which the parties have chosen both the CISG and the above types of arbitration rules.

III A MATTER OF GOOD INTENTIONS: PLACING THE ISSUE OF THE  
ALLOCATION OF BURDEN OF PROOF WITHIN THE CISG  
(LARRY DiMATTEO)

Professor Schroeter eloquently summarises the rationales given in support of the mainstream view that the allocation of the burden of proof is within the scope of the CISG. The main arguments are based on analogical reasoning among the provisions of the CISG and, alternatively, through the recognition of the burden of proof as an implied general principle. The existence of burden-allocating words, such as 'prove', 'unless', and 'except' allow for the inference that the allocation of the burden of proof is expressly dealt with by the CISG. The mainstream argument advances that these provision-specific cases should be read as reflecting an implied general principle based on the international character of the CISG, the commonality of burden

---

*Commentary on the UN Convention on the International Sale of Goods (CISG)*, (Oxford University Press, 4<sup>th</sup> ed, 2016) 102.

<sup>43</sup> *UNCITRAL Arbitration Rules*, GA RES 65/22, UN GAOR, 65<sup>th</sup> sess, Agenda Item 77, UN Doc A/65/465 (10 January 2011) art 27(1): 'Each party shall have the burden of proving the facts relied on to support his claim or defence'.

<sup>44</sup> Vienna International Arbitration Centre, *Vienna Rules of Arbitration* (1 July 2013) art 29(1): 'If the arbitral tribunal considers it necessary, it may on its own initiative collect evidence, question parties or witnesses, request the parties to submit evidence, and call experts'.

allocations across legal systems and the importance of harmonisation of laws.

This section will focus on three areas: firstly, it will demonstrate why the burden of proof is not within the scope of the CISG; secondly, it will examine why that question is not of great importance; and finally, it will determine, if the burden of proof is within the scope of the CISG, whether the standard of proof is also within its scope. As to the first point, it will be argued that nothing in the drafting history of the CISG indicates that the burden of proof was intended to be within its scope. The burden of proof is essentially a matter of procedure to be determined by the court of the *lex fori* and the nuances of burden of proof presumptions and burden shifting vary across legal systems.

The internal-external gap distinction is a good place to start any discussion of whether a particular issue or topic is within the coverage of the CISG. An internal gap or *praeter legem*, is a topic that is not expressly dealt with in the CISG by way of an express principle or rule, but the issue is one commonly found in an area that the CISG covers. The internal gap argument is that the 'rule gap' is attached to an express rule or principle of the CISG and therefore, the gap is to be filled using CISG interpretive methodology; the court or arbitral panel shall develop an autonomous interpretation. Autonomous interpretation in relation to filling in an internal gap means the creation of an autonomous rule or principle free of national law bias. Its autonomy is derived mainly through analogical reasoning from the most pertinent CISG provisions and general principles.

An external gap or *intra legem* is an area of sales or contract law that is expressly or implicitly outside the scope of the CISG.<sup>45</sup> There is a much larger group of issues that are implicitly excluded from the CISG, the reason being that the CISG is largely a non-comprehensive set of legal rules.<sup>46</sup> Article 4 states the extent of the scope of the CISG

---

<sup>45</sup> There are a handful of issues and topics expressly excluded from the reach of the CISG. See CISG, above n 17, arts 2, 3, 4, 5 and 28.

<sup>46</sup> Examples include pre-contractual liability or the duty of good faith negotiations, limitation period, duty of confidentiality, mistake, misrepresentation, undue influence, and duress.

as governing ‘*only* the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract’.<sup>47</sup> Also, art 4’s description of coverage indicates that the CISG is a body of substantive, and not procedural rules.

If this is the case, one argument against the inclusion of the issue of the burden of proof within the CISG is that it does not come within the substantive sweep of art 4. However, the CISG is a bit more nuanced than is indicated by this substantive law argument. For example, art 11 provides a rule of evidence allowing for the admission of extrinsic evidence, including witness testimony. As noted by Professor Schroeter, art 79 expressly allocates the burden of proving the existence of an impediment to the claiming party ‘if he *proves* that the failure was due to an impediment’.<sup>48</sup>

In determining whether the burden of proof is an internal or external gap, the following rationales will be explored: the legislative history, the purpose and general principles of the CISG, and the substantive-procedural law distinction. The drafting history of the CISG is at best ambiguous when it comes to the allocation of the burden of proof. Again, the main example given by proponents of the position that the burden of proof is an internal gap is that some CISG provisions contain indications of the burden of proof, such as art 79(1).<sup>49</sup> The fact that a few provisions in the CISG reference the burden of proof is a thin reed to imply that more general rules relating to the burden of proof are within its scope. A broader, yet stronger, argument posed by Professor Schroeter is that the primary purpose of the CISG is the harmonisation of law, and therefore, it should be broadly construed. Thus, when in doubt, the courts and arbitral tribunals should avoid the nuance of national sales laws in favour of an extension of the CISG. Against this argument is the legislative history supporting the view that the CISG does not regulate the burden of proof.<sup>50</sup>

---

<sup>47</sup> CISG, above n 17, art 4 (emphasis added).

<sup>48</sup> Ibid art 79 (emphasis added).

<sup>49</sup> CISG, above n 17, Official Records II 238 s.

<sup>50</sup> Ibid II ss 295.

Despite the ‘broadly’ construed argument noted above, the scope of the CISG must be determined through CISG interpretive methodology and other traditional methods of interpretation.<sup>51</sup> First, one should use general principles. However, the problem of general principles – such as good faith and international character – is that they are empty vessels that can be filled in different ways depending upon the motivation of the interpreter. Almost any issue can be bootstrapped to such language to include the issue within the scope of the CISG. However, arguments for recognising some of these issues not expressly dealt with by CISG language and treating them as internal gaps are plausible, whereas others are so extenuated that they are wholly implausible.

An example of a plausible connection of an issue to CISG coverage is the issue of the rate of interest. Article 78 states that:

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.<sup>52</sup>

This provision demonstrates a common problem with CISG provisions: the lack of detail and guidance as to the scope of the provision’s intended coverage, leaving many questions unanswered. What does ‘sums that is in arrears’ actually mean? Does it cover all sums in arrears? Does it cover just the buyer’s non-payment or belated payment of the price? Does it include the period of time in which a seller holds payment that is subsequently refunded? Does it include the payment of interest on the period from which damages are awarded in court or arbitration and the time that the judgment or award is actually satisfied? Finally, should determining the rate of interest be considered an internal gap to be filled through the use of art 7 or is it an external gap to be filled under national laws?

---

<sup>51</sup> André Janssen and Larry DiMatteo, ‘Interpretive Uncertainty: Methodological Solutions for Interpreting the CISG’ (2012) 2 *Nederlands Tijdschrift voor Handelsrecht (Netherlands Journal of Commercial Law)* 52.

<sup>52</sup> CISG, above n 17, art 78.

The legislative history pertaining to art 79 notes that the 'ICC proposes that paragraph (5) be amended to assure that an exemption would not preclude the injured party from claiming interest or compensation due to any change in currency rates'.<sup>53</sup> Further, the legislative history shows that there were a number of issues not dealt with directly by the language of art 78:

Interest on delay in receiving price or any other sum in arrears:

78A1 Must the sum be 'liquidated'? Delay in paying damages.

78B Rate of interest.

78B2 Aggrieved party's loss from borrowing; current interest rates.

78B3 Applicable domestic law; compounding of interest.<sup>54</sup>

The original text of art 78 provided a fuller coverage relating to the issue of claiming interest as damages. It states that 'the seller is in any event entitled to interest on such sum as is in arrears at a rate equal to the official discount rate in the country where he has his place of business'.<sup>55</sup> Subsequent legislative history uses the term 'the party in default'.<sup>56</sup> Professor Schlechtriem notes that 'the interest question provoked extraordinary difficulties at the Conference'.<sup>57</sup> He notes that the payment of interest was discussed in the negotiations leading to the 1978 Draft Convention in a very narrow context, resulting in a single provision concerning the payment of interest related to the

---

<sup>53</sup> Comments and Proposals by Governments and International Organisations on the Draft Convention on Contracts for the Sale of International Sale of Goods, and on Draft Provisions Concerning Implementation, Reservations and Other Final Clauses, UN Doc A/CONF.97/9 (21 February 1980).

<sup>54</sup> *UNCITRAL Outline of the CISG (The UNCITRAL Thesaurus)*, UN Doc A/CN.9/SER.C/GUIDE/1 (12 September 1995).

<sup>55</sup> 'Report of Committee of the Whole I Relating to the Draft Convention on the International Sale of Goods' UN Doc A/32/17 (23 May-17 June 1977) annex I.

<sup>56</sup> *Report of the First Committee*, UN Doc A/CONF.97/11 (7 April 1980).

<sup>57</sup> Peter Schlechtriem, *Uniform Sales Law—The UN-Convention on Contracts for the International Sale of Goods* (Manz, 1986) 98.

seller's duty to refund the price after avoidance of the sales contract'.<sup>58</sup> In a subsequent version, the scope of the interest provisions broadened with a general statement that 'the obligation to pay interest as a general rule [is] so that a debtor still remains liable for interest payments even if his default is due to an impediment beyond his control'.<sup>59</sup> It is also interesting to note that the payment of interest relates to different CISG provisions. For example, the legislative history discusses that 'if the seller is bound to refund the price, he must also pay interest thereon from the date on which the price was paid',<sup>60</sup> which was subsequently embedded in art 84.

Courts and scholars are divided on whether the rate to be charged is within or outside the scope of the CISG. This is similar to the split on the issue of the burden of proof, although the majority opinion is that the burden of proof is within the scope of the CISG. In the case of the rate of interest, unlike the burden of proof, there is an express provision dealing with the issue of the payment of interest. A Vienna arbitration panel reasoned, in a manner much like those who assert that the burden of proof is with the scope of the CISG, that the issue of the rate of interest was an internal gap 'because the immediate recourse to a particular domestic law may lead to results which are incompatible with the principle embodied in art 78'.<sup>61</sup>

However, the arbitration panel conditioned the above statement by noting that this should be the case 'at least in the cases where the law in question expressly prohibits the payment of interest'.<sup>62</sup> Nonetheless, numerous scholars and courts have held the issue of the rate of interest to be outside the scope of art 78. A German court held that the rate of interest was outside of the scope of the CISG by noting, 'that a uniform solution could not be achieved at the conferences for the drafting of the CISG, as the different opinions about the interest

---

<sup>58</sup> Ibid.

<sup>59</sup> Ibid 99.

<sup>60</sup> *Report of the First Committee*, UN Doc A/CONF.97/11 (7 April 1980).

<sup>61</sup> *Rolled Metal Sheets Case* (Award, Case No SCH-4366, Vienna Arbitration Proceeding, 15 June 1994).

<sup>62</sup> Ibid.

obligation were irreconcilable'.<sup>63</sup> Some scholars and courts have argued that it is within the coverage of art 78.<sup>64</sup>

Another case study involving the scope of the CISG will be undertaken before proceeding to the issue of the burden of proof. An example of an implausible extension of the scope of the CISG would be to argue that the issue of hardship is within the scope of 'impediment' found in art 79. There is a debate between those who view hardship as a form of impediment covered under art 79 and those that view that art 79 should be strictly construed as covering only impossibility or *force majeure*. The neutrality provided by the word 'impediment' is no doubt an attempt to avoid the rift between countries that recognise hardship and those that do not. For example, the common law and German civil law are divided on whether hardship or changed circumstances can provide an excuse or exemption from liability for breach of contract. Hardship is not grounds for excuse under the common law.<sup>65</sup> In contrast, the German law's concept of change of circumstances provides relief for cases of objective and subjective impossibility, frustration of purpose and hardship.<sup>66</sup>

---

<sup>63</sup> *Landgericht Aachen* (District Court Aachen), Case No 41 O 111/95, 20 July 1995).

<sup>64</sup> *Lugano, Cantone del Ticino, Tribunale d'appello* (Appellate Court Lugano, Canton of Ticino, Case No. 12.97.00193, 15 January 1998; Court of Arbitration of the International Chamber of Commerce, Case No 9448, July 1999; See also EA Farnsworth, 'CISG Article 78: Endless disagreement among commentators, much less among the courts' in C M Bianca and Michael J Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Fred B Rothman & Co 1987) 570.

<sup>65</sup> However, the notion of hardship is captured within the American Uniform Commercial Code under the doctrine of impracticability, see UCC § 2-615 (2002). In practice, the courts rarely use the excuse of impracticability to relieve a party from its contractual obligations.

<sup>66</sup> See Bürgerliches Gesetzbuch [Civil Code] (Germany) § 275, 313; See also L DiMatteo, 'Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines', (2015) 27 *Pace International Law Review* 258, 261.

Professor Honnold has noted that the word impediment was substituted for the word ‘circumstances’ to disallow the granting of an exemption ‘merely because performance became more difficult or unprofitable’.<sup>67</sup> Peter Schlechtriem also examined whether mere unaffordability could support a claim of impediment and concluded that ‘increased procurement and production costs do not constitute exempting impediments’.<sup>68</sup> However, he argues that the lack of coverage of hardship in art 79 is an internal gap under the harmonisation rationale, reasoning that it would prevent the entry of divergent national law views on the subject.<sup>69</sup>

However, the case law has narrowly construed art 79 and courts have not provided exemptions due to hardship. For example, in a Dutch case, a seller claimed an exemption because a frost had prevented the delivery of the contract amount of mandarin oranges.<sup>70</sup> Instead of using general principles, the Court looked to French and Swiss law to find a possible hardship. The Court then applied the good faith principle, arguing that the buyer should have accepted a lesser quality substitute, and avoided the key issue of whether the changed circumstances amounted to an impediment under art 79.

The Belgian Supreme Court in the *Scaform International* case rejected the lower court’s decision that the issue of hardship was an external gap.<sup>71</sup> The Court structured an argument that the general principles of art 7, especially the duty of good faith, supported the inclusion of hardship within the scope of art 79. However, this decision can be criticised as placing a civil law perspective on the issue of the scope of impediment, instead of making an autonomous interpretation as required under art 7. First, the Court did not make a convincing argument that the notion of impediment goes beyond

---

<sup>67</sup> DiMatteo, above n 66, 279.

<sup>68</sup> Ibid 280.

<sup>69</sup> Schlechtriem, above n 57, 100.

<sup>70</sup> CA Colmar Cour d’appel (French Appellate Court) Case No 1 A 199800359, 12 June 2001; See Tribunale Civile di Monza (District Court Monza), RG 4267/88, 14 January 1993.

<sup>71</sup> Hof van Cassatie [Court of Cessation – Supreme Court], C.07.0289.N, 19 June 2009 June 19, 2009 (‘Scaform International case’).

impossibility to mere hardship. Second, the notion of hardship as espoused by the court was aligned with the German civil law concept of ‘changed circumstances’ and not discussed within a neutral, international perspective.

Third, the Court referenced the Principles of International Commercial Contracts (‘PICC’)<sup>72</sup> to support the argument that hardship can be viewed as an impediment under art 79. In fact, the Court went further by suggesting that the PICC can be directly used to interpret art 79. This is problematic because the PICC contains both an excuse or impossibility provision and a hardship provision, while the CISG possesses the single provision of impediment.<sup>73</sup> The *Scaform International* case fails to live up to the mandate of autonomous interpretation of CISG provisions by borrowing concepts of civil law countries – hardship, contractual disequilibrium, and the right-duty of renegotiation. Despite the findings in *Scaform International*, art 79 cases have focused on the more traditional excuse of impossibility.

If the restrictive or narrow view of art 79, as espoused in the Secretariat Commentary and sustained by existing case law, remains true, then it becomes the oddest article in the CISG. A major rationale in support of a more expansive view of art 79 is the duty of good faith in art 7. However, that general principle is another example of civil law jurists and scholars bootstrapping a duty of good faith in the performance and enforcement of contracts, political reasons aside, to the clear mandate of art 7 that good faith is restricted to the interpretation of CISG provisions. By neglecting the literal meaning of art 7, a general duty of good faith in sales contracts was smuggled into the CISG under rationales, including its usage in trade or its

---

<sup>72</sup> ‘[T]o fill the gaps in a uniform manner adhesion, should be sought with the general principles which govern the law of international trade. Under these principles, as incorporated *inter alia* in the Unidroit Principles of International Commercial Contracts, the party who invokes changed circumstances that fundamentally disturb the contractual balance is also entitled to claim the renegotiation of the contract’.

<sup>73</sup> DiMatteo, above n 66, 284.

ancillary application to the reasonableness standard found throughout the CISG.

In the end, whether it is a legitimate interpretation or not, a general duty of good faith has been ensconced in CISG jurisprudence. Eventually, as the CISG expands its reach, the underlying principle of good faith should encourage a wider use of art 79, especially when parties overreach and risks are unintentionally misallocated and where real substantive injustices dictate acts of judicial and arbitral discretion. Article 79 has a long way to go to be interpreted as providing exemptions in cases of hardship. In practice, the malleability of phrases, such as ‘impediment’, ‘foreseeability’ and ‘beyond a party’s control’ have been used to render art 79 a most restrictive excuse doctrine.

A more liberal interpretation of art 79 may include recognising exemptions for severe hardship, as supported by the CISG Advisory Council.<sup>74</sup> In the words of Professor Ulrich Magnus, ‘although not often granted, the CISG’s exemption provision is always theoretically applicable’.<sup>75</sup> However, the approach that a provision of the CISG is ‘always theoretically applicable’ is a slippery slope that pro-CISG scholars, courts and the CISG Advisory Council have fallen prey to. The idealistic quest for the harmonisation of international sales law must not overreach to arbitrarily expand what is clearly a non-comprehensive sales law instrument. The non-comprehensiveness of the CISG must be recognised and respected.

In comparing the gaps of arts 78 and 79, there is greater plausibility in arguing that the rate of interest is an internal gap. This is given that

---

<sup>74</sup> CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007.

<sup>75</sup> Ulrich Magnus, ‘Remedies: Damages, Price Reduction, Avoidance, Mitigation, and Preservation’ in L DiMatteo (ed), *International Sales Law: A Global Challenge* (Cambridge University Press, 2014) 257, 261.

there is an explicit provision on interest within the CISG. Tying hardship to the concept of impediment is much less plausible given the different meanings applied to the concepts of impossibility or *force majeure* and hardship. It is less implausible for the German courts to argue subjective impossibility is within the notion of impediment. However, an autonomous interpretation should lead them to the recognition that subjective impossibility is unique to German law, while objective impossibility, event or obstacle external to the parties is the core concept of national excuse doctrines and most *force majeure* clauses. The issue of the allocation of the burden of proof as being within the CISG also fails the plausibility test. There is no express provision like ‘interest’ in art 78 or ‘impedement’ in art 79 to rationalise it as other than an external gap.

Again, the harmonisation and substantive or substantive-like rationales for the inclusion of the burden of proof are extenuated at best. Article 4 of the CISG states that the ‘CISG governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer’. Thus, the strongest case for the inclusion of the burden of proof within the scope of the CISG is that it is a rule of substantive law, which is clearly not the case. An alternative argument is that it is of such importance that it is substantive-like. If it is so important as to be closely linked to substantive law, why was an express provision dealing with the burden of proof not incorporated into the CISG? The arbitral panel in *Maaden v Thyssen*<sup>76</sup> asserted that if it was part of substantive law it is an external gap to be determined by ‘rules of private international law’<sup>77</sup> and if it is part of procedural law, then it would be determined by the *lex fori*.<sup>78</sup>

A further danger of including the burden of proof within the scope of the CISG is that the next logical step would be to argue that it should be extended to include the standard of proof. Unlike the allocation of the burden of proof, whose allocation is relatively consistent across legal systems, the standard of proof varies greatly across legal

---

<sup>76</sup> *Maaden v Thyssen*, Court of Arbitration of the International Chamber of Commerce, Case No 6653 of 1993, 26 March 1993.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

systems. For example, the standard of proof is similar in nature between the US ('preponderance of the evidence') and the United Kingdom ('balance of probabilities'), but vastly different in Germany ('conviction close to certainty so that reasonable doubts are silenced') and Italy ('facts unproven even if possible or likely'). Thus, the possibility of a court bringing the issue of standard of proof within the scope of the CISG would be problematic. Alternatively stated, if harmonisation is the objective, then an autonomous interpretation of the standard of proof would be much more important than the allocation of the burden of proof. However, just like the burden of proof, that type of harmonisation is not as sustainable as the simple filling of an internal gap in the CISG.

Furthermore, how does the implied allocation of the burden of proof relate to a choice of law or forum selection clause? The insertion of choice of law or forum selection clauses implies that the parties agree to the procedural rules of the chosen law or court. Would the choice of law or forum be considered a derogation of the so-called CISG implied allocation of burden of proof rule? Possibly not, because such clauses do not expressly derogate from this implied burden of proof allocation. This is another example of the problem created by bringing the allocation of the burden of proof within the scope of the CISG. One final point is that allocation of the burden of proof is a much more nuanced issue than a simple allocation would imply, since there is variation of national rules on presumptions and exceptions related to the shifting of the burden of proof. This may again be rationalised by the notion of harmonisation, but in fact the complexity of burden of proof issues would leave a sordid mess for courts to autonomously interpret when presumptions are to be given or burdens shifted. This is simply too far afield and best left to domestic law where it belongs. In sum, there is less than a persuasive argument that the allocation of the burden of proof is a topic implicitly within the scope of the CISG.

#### IV ATTORNEY FEES: INCLUDED (ANDRÉ JANSSEN)

The question of whether the recovery of attorney's fees is covered by the CISG is important because domestic civil procedural laws on the

topic vary worldwide. In the first place, it matters in the US and the few countries that follow the so-called American Rule. As a default rule, it requires each party to a legal dispute to bear their own legal costs. The winning party pays its own legal costs and cannot collect those costs as damages. In such legal systems, the question of whether attorney's fees can be considered as damages under the CISG is an important one as it would pre-empt the application of the American Rule. The majority of common and civil law countries, including Germany (civil) and Australia (common), have procedural rules that abide by the 'costs-follow-the-event' principle, also known as the loser pays rule, which allows the winning party to recover at least a portion of its legal costs as damages.

Thus, whether the CISG is applicable to the issue of the recoverability of legal costs would make a substantial difference in damages. If legal fees are within the scope of the CISG, whether or not they are recoverable would pre-empt the application of the loser pays rule, just as it would the American Rule. First, if it is determined that legal fees are within the scope of the CISG and are not recoverable as damages, then the normal damages awarded under the loser pays rule would be diminished. Second, if the case is within the scope of the CISG and costs are recoverable, then the exact amount recoverable would be determined by an autonomous interpretation unbiased from the nuances of the loser pays rule across national legal systems.

The uncertainty of the recoverability of legal costs as damages under art 74 of the CISG is partially due to a division among judges and scholars as to whether they are recoverable, as well as the diverging legal arguments used to support the different views. Arguably, the majority of scholars<sup>79</sup> hold the view espoused in Opinion No 6 of the CISG Advisory Council, that attorney's fees are not recoverable under the CISG and are purely a procedural question governed by national civil procedure laws.<sup>80</sup> However, several scholars have

---

<sup>79</sup> See I Schwenzler, 'Rechtsverfolgungskosten als Schaden?' in P Gauch, F Werro and P Pichonnaz (eds), *Mélanges en l'honneur de Pierre Tercier* (Schulthess, 2008) 417.

<sup>80</sup> CISG Advisory Council Opinion No 6: Calculation of Damages Under CISG Article 74 (Rapporteur: Professor John Y Gotanda).

asserted that attorney's fees are recoverable as part of the damages allowed under art 74 of the CISG.<sup>81</sup>

The courts have failed to find a common or uniform approach on the matter and are unlikely to do so in the immediate future. For example, some civil law countries that follow the loser pays rule, such as Belgium,<sup>82</sup> Germany,<sup>83</sup> the Netherlands<sup>84</sup> and Switzerland<sup>85</sup> have interpreted art 74 to include the collection of attorney's fees as reimbursable damages. In the opposite direction, US courts, with the exception of the District Court decision in the *Zapata* case<sup>86</sup> (subsequently reversed on appeal), have held that whether or not attorney's fees are recoverable is a purely national issue and outside

---

<sup>81</sup> See B Piltz, 'Litigation Costs as Reimbursable Damages,' in L DiMatteo (ed), *International Sales Law: A Global Challenge* (Cambridge University Press, 2014) 286.

<sup>82</sup> Rechtbank van Koophandel te Hasselt (Commercial Court Hasselt), CISG-online No 1107, 12 January 2006.

<sup>83</sup> Landgericht München (District Court München), CISG-online No 1998, 18 May 2009; Landgericht Potsdam (District Court Potsdam) CISG-online No 1979, 7 April 2009; Landgericht Hamburg (District Court Hamburg), CISG-online No 1999, 17 February 2009; Oberlandesgericht Köln (Provincial Appellate Court Cologne), CISG-online No 1218, 3 April 2006; Oberlandesgericht Düsseldorf (Provincial Appellate Court Düsseldorf), CISG-online No 916, 22 July 2004; Oberlandesgericht Düsseldorf (Provincial Appellate Court Düsseldorf), CISG-online No 201, 11 July 1996.

<sup>84</sup> Rechtbank Rotterdam (District Court Rotterdam), CISG-online No 2098, 17 March 2010; Rechtbank Rotterdam (District Court Rotterdam), CISG-online No 1815, 21 January 2009; Hof's-Hertogenbosch (Hof District Appeal Court), CISG-online No 550, 2 October 1997.

Kantonsgericht Zug (District Court Zug), CISG-online No 2024, 27 November 2008; Handelsgericht des Kantons Aargau (Commercial Court Aargau), CISG-online No 418, 19 December 1997.

<sup>86</sup> *Zapata Hermanos Sucesores, SA v Hearthside Baking Co Inc d/b/a Maurice Lenell Cooky Co*, 155 F Supp 2d 969 (ND Ill, 2001); Later overruled by *Zapata Hermanos Sucesores, SA v Hearthside Baking Co Inc d/b/a Maurice Lenell Cooky Co*, 313 F 3d 385 (7<sup>th</sup> Cir, 2002).

the scope of the CISG.<sup>87</sup> However, the US District Court of New York in the *Stemcor* case expressed doubts, stating that ‘Article 74... does not unambiguously bar recovery of legal fees and costs’.<sup>88</sup> It is yet to be seen whether the *Stemcor* decision has any impact on future cases involving the application of the CISG by US courts.

*A First Argument for the Recoverability of Attorney’s Fees Under the CISG: Plain Meaning of the CISG*

To find the correct answer to the question of whether attorney’s fees are recoverable under the CISG as damages requires an interpretation of the wording of the CISG. Article 4(1) states that ‘(t)his Convention governs (only) the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract’.<sup>89</sup> There is no specific exclusion of the legal costs issue in art 4(2) or elsewhere in the CISG. Article 74 states that ‘damages for breach of contract by one party consists of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach’.<sup>90</sup>

Reading art 4 in conjunction with art 74, using the plain meaning of the language, the most plausible argument is that attorney’s fees should be recoverable under the full compensation principle (‘sum equal to the loss’) of art 74. In addition, there is nothing further in the CISG or official CISG documents that limits the phrase ‘sum equal to the loss’. Anecdotally, to emphasise the plain meaning approach, the attorney’s fees problem was posed to fifty law students in an International Sales Law class. The students were asked to read the texts of art 4 and 74 and give their opinions on whether the recoverability of attorney’s fees is within the scope of the CISG. All

---

<sup>87</sup> See only *Zapata Hermanos Sucesores, SA v Hearthside Baking Co Inc d/b/a Maurice Lenell Cooky Co*, 313 F 3d 385 (7<sup>th</sup> Cir, 2002); *Ajax Tool Works Inc v Can-Eng Manufacturing Ltd* (ND Ill, 2003).

<sup>88</sup> *Stemcor USA Inc v Miracero, SA de CV*, 66 F Supp 3d 394 (SD NY, 2014)

<sup>89</sup> CISG, above n 17, art 4(1).

<sup>90</sup> *Ibid* art 74.

fifty students answered that the wording of the CISG unambiguously supported the recoverability of legal costs as damages.

*B Second Argument for the Recoverability of Attorney's Fees Under the CISG: The Principle of Full Compensation*

One of the fundamental principles on which the CISG is based is the principle of full compensation for all losses.<sup>91</sup> There are only two requirements which need to be fulfilled in order to recover damages related to a breach of contract:<sup>92</sup> (1) proof of damages; and (2) that those damages were a foreseeable consequence of the breach at the time of the conclusion of the contract.<sup>93</sup> The incurrence of legal costs due to a breach of contract is foreseeable and a direct consequence of the breach under art 74. Placing the recoverability of attorney's fees outside the scope of the CISG would interfere with the underlying principle of full compensation. Only an express exclusion of legal costs as recoverable damages can pre-empt the application of fundamental principles, such as full compensation for any loss.<sup>94</sup>

*C Summary*

This contribution has demonstrated that there are good arguments – the plain meaning interpretation of the CISG and the principle of full compensation – for the recoverability of attorney's fees as damages under art 74 CISG. However, considering the diverging case law and views in the legal literature, it is obvious that this important practical issue is far from being resolved. The failure of the courts to apply CISG interpretive methodology properly, by applying general principles of uniformly to interpret the CISG on this subject is unsettling. Best practice suggests that the issue of the recoverability of attorney's fees should be expressly dealt with in the contract.<sup>95</sup>

---

<sup>91</sup> Ibid arts 45, 61, 74.

<sup>92</sup> Ibid arts 45, 61.

<sup>93</sup> Ibid art 74.

<sup>94</sup> See Piltz, above n 81, 293.

<sup>95</sup> Although, it should be noted that 'attorney fee clauses' are routinely disregarded under the American rule. In the US, they are considered as pre-empted by the rules of civil procedure or as illegal penalties.

## V ATTORNEY FEES: NOT INCLUDED (CAMILLA BAASCH ANDERSEN)

It is fascinating, to a (slowly) ageing academic, how fashion has an ebb and flow: beehive hair, short skirts, platform shoes, even shoulder pads. Eventually, everything comes back into fashion. So it is with legal issues under the CISG as well it seems, as we now find ourselves revisiting an old classic: should attorney's fees be recoverable as damages under art 74? The topic is in fashion again.<sup>96</sup> Ah, how I remember with fondness the days of the *Zapata v Hermanos* case,<sup>97</sup>

---

<sup>96</sup> This issue was covered extensively in academic literature around the time of the *Zapata* case. See, amongst others (some more recently): John Felemegas, 'The Award of Counsel's Fees under Article 74 CISG, in *Zapata Hermanos Sucesores v Hearthside Baking Co* (2002) 6 *Vindobona Journal of International Commercial Law and Arbitration* 30–39; Bruno Zeller 'Interpretation of Article 74 – *Zapata Hermanos v Hearthside Baking* – Where Next?' (2004) 1 *Nordic Journal of Commercial Law* 1, 1–11; Norman J Shachoy symposium, 'Attorneys' Fees: Last Ditch Stand?' in 'Assessing the CISG and Other International Endeavors to Unify International Contract Law: Has the Time Come for a New Global Initiative to Harmonize and Unify International Trade?' (2013) 58 *Villanova Law Review* 4, 761–771; Milena Dordevic, 'Mexican Revolution' in Vasiljevic et al (eds), *CISG Jurisprudence and Case-Law: Attorneys' Fees as (Non) Recoverable Loss for Breach of Contract, in Private Law and Law Reform in South East Europe: Liber Amorum Christa Jessel-Holst* (Faculty of Law, University of Belgrade, 2010) 199; Harry Flechtner, 'Recovering Attorneys Fees as Damages under the UN Sales Convention: A Case Study on New International Practice and the Role of Foreign Case Law in CISG Jurisprudence, with comments on *Zapata Hermanos Sucesores SA v Hearthside Baking Co* (2002) 22 *Northwestern Journal of International Law & Business* 121; Joseph Lookofsky, 'Comments on *Zapata Hermanos v Hearthside Baking*' (2002) 6 *Vindobona Journal of International Commercial Arbitration* 27; Joseph Lookofsky, *Viva Zapata! CISG Article 74 and the American Rule* (8 January 2003) Pace Law School Institute of International Commercial Law <<http://www.cisg.law.pace.edu/cisg/biblio/lookofsky7.html>>.

<sup>97</sup> *Zapata Hermanos Sucesores, SA v Hearthside Baking Co Inc d/b/a Maurice Lenell Cooky Co*, 313 F 3d 385 (7<sup>th</sup> Cir, 2002).

how we toiled over that *Amicus Curiae*<sup>98</sup> – oh, how we lamented for the bakery and how we sulked when the *Certiorari* was denied.<sup>99</sup> Ah yes, what a missed opportunity for the US Supreme Court. However, I will get back to that... Now let's get to the point; why should art 74 not include attorney's fees?

### *A Right but Wrong*

My learned colleague Professor Jansen has promoted the argument in favour of applying art 74 to attorney's fees and – although I am representing the opposing view – allow me to confess that from a personal and subjective perspective, as a legal theorist and a civil lawyer: I agree! Surprise... art 74 is a no-fault full compensation rule, and as such it seems logical to include attorney's fees.

However – and here I reverse my opinion 180 degrees – my subjective opinion on the application of a no-fault full compensation rule is irrelevant. What is relevant is that this rule is a shared international rule, and my subjective perspective is that of a civil lawyer, to whom the procedural and substantive distinction is largely immaterial in the context of full compensation.<sup>100</sup> Article 7 requires this shared rule to apply with 'international character' and 'uniformity'.<sup>101</sup> Experience tells us, quite clearly, that this uniformity is not achieved if we try to force States to submit to practices which are contrary to their own legal systems.<sup>102</sup> Therefore – let us look at this issue from a transnational comparative law perspective.

---

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> As of 3<sup>rd</sup> March 2016 UNCITRAL reports that 84 States have adopted the CISG, see UNCITRAL, *Status Unites Nations Convention on Contracts for the International Sales of Goods (Vienna, 1980)* (2016).

<sup>101</sup> CISG, above n 17, art 7(1) prescribes that: 'In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade'.

<sup>102</sup> See generally Camilla Andersen, *Uniform Application of the International Sales Law* (Kluwer Law International, 2007).

### *B Homeward Trends in Cases and in Scholarships*

All the reported cases where art 74 has been stretched to include lawyers' fees are – to my knowledge – from civil law jurisdictions which embrace the loser pays doctrine, and do not distinguish the lawyers' fees too much from the substantive compensation elements. However, to the common lawyer, especially the (on this occasion, misunderstood) Americans who do not embrace 'loser pays', this issue is so blatantly one of procedure and not subject to the substantive regulation of the CISG. I recall my former mentor Lookofsky debating the issue with passion, referring to the judge which was swayed by the civil law approach as 'soft in the head' (I am hoping memory serves me here, and that I am not sued) and revering Possner's reversal of the Zapata findings. Academics do not get much more passionate than that... so where does that leave us?

On the one hand, broadly speaking, we have civil lawyers, scholars and judges who are happy to stretch art 74 to lawyers' fees in pursuit of a uniform approach – because it does not shake their world too much, and seems like a sound pursuit of a lofty goal. They use art 74 analogously to the procedural issue of lawyers' fees because they do not distinguish as religiously between the two and because using art 74 is convenient due to their procedural 'loser pays' rule under which they would have awarded those damages anyway. On the other hand, we have a set of very disturbed common law lawyers, scholars and judges to whom this is simply wrong. Some of the more internationalised ones are willing to entertain the notion that this should be compromised on the altar of uniformity. However, the reality is that – especially on the benches – these are a very small minority.

### *C Safeguarding Uniformity*

So we cannot include lawyers' fees under art 74. To stretch this uniform substantive regulation into the area of procedure is fine if all players agree to do it to pursue uniformity across borders. However, to do it only in some parts, while others refuse due to a different legal classification and legal culture in the area, is folly. Let the civil lawyers continue to award damages under art 74 if they must – but let

it be clear that they are using it analogously to embrace full compensation in a procedural field. Let it be clear that we are not – and cannot – force our common law cousins to do it. So to produce certainty and predictability we must advise our clients that this issue is outside the scope of the CISG. To advise otherwise, and to prescribe otherwise in a scholarly context, is to sow uncertainty and unpredictability unnecessarily.

So, back to the *Certiorari* and the *Amicus*– did we toil in vain? No, we did not. I still lament the fact that the US Supreme Court did not feel inclined to rule on this issue. What we needed at the time was a strong judicial voice considering the uniformity issues raised in the *Certiorari* alongside the civil law cases citing, deciding, in principle, that this is procedural and that the US does not wish to extend art 74 as far as others have done. Possner’s reversal in the Court of Appeal in *Zapata* centred on foreseeability and not the inclusion issue. The *Certiorari* was never about wanting US courts to side with the German and Italian case law, but to at least consider the issue of uniform application and make a deliberate decision in the light of that. I can almost see Al Kritzer smiling down on me from his cloud as I write this. It was a shame that the US Supreme Court missed this opportunity to raise awareness of the application of the international character of the CISG while making a clear decision on the issue of inclusion – many other US issues could have been averted.

However then – a silver lining – perhaps if the *Certiorari* had not been denied, we would have had a different question for the *Vis* problem this year? I rest my case and look forward to ensuing discussions and dissenting opinions.

## VI CONCLUSION

The above discussion proves two widely accepted findings when dealing both with international transactions and the harmonisation of the law applicable to them. First, it is crucial to define the terms used precisely and to explain what is meant by them. The same term may often be used with a different scope in different jurisdictions. Without a precise terminology which clearly distinguishes, for example, between the various aspects of the burden of proof, the standard of

proof and the means to meet such standard, there is a high risk that apples will be compared to pears. Second, the tendency to fall back on domestic concepts to interpret broad terms under the CISG will probably continue until case law across various jurisdictions has developed a commonly acknowledged meaning for such terms. That applies *a fortiori* when it comes to filling gaps in the CISG either by the general principles underlying the CISG or by reference to national law. Thus, it can only be hoped that the highest courts in every jurisdiction take every chance to contribute to the development of such a commonly accepted interpretation.



# MAKING A DEAL WITH THE DEVIL: ARE CURRENT ANTITRUST SANCTIONS DETERRING CARTEL BEHAVIOUR?

KEITH VIOLANTE\*

## Abstract

*Antitrust Laws – Antitrust Violations – Sherman Act – United States of America Jurisdiction – DOJ Leniency Program – ACPERA’s Leniency Program – Civil Penalties – Criminal Penalties – Corporations – Individuals*

*Antitrust laws prevent corporations from engaging in violations such as price fixing, bid rigging, customer or territory allocation and output restriction. Some scholars have considered the last two decades to be a ‘golden age’ in antitrust enforcement. The latest changes to the Sherman Antitrust Act, 26 Stat 209, 15 USC §§ 1–7 (‘Sherman Act’) have increased the maximum statutory civil and criminal sanctions for corporations and individuals and increased the incentive for the corporations to take advantage of the Department of Justice’s (‘DOJ’) highly successful amnesty program. This allows corporations and individuals who report an antitrust scheme to be granted amnesty from prosecution.*

*There is no indication that the dramatic increase in both corporate fines and the average length of jail sentences has resulted in a significant decline in antitrust violations. This article will suggest that effective optimal deterrence should focus on individuals and not the corporations when determining sanctions for antitrust violations. In addition, the DOJ’s Amnesty Program should mandate specific requirements to fulfil the ‘satisfactory cooperation’ requirement.*

## I INTRODUCTION

The Supreme Court of the United States (‘US’) has long held that the enforcement of antitrust laws is ‘as important to the preservation of

economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms'.<sup>1</sup> Enforcement of antitrust laws is vital to fair trade and economic freedom; courts have imposed severe civil and criminal penalties on corporations and individuals found to have violated antitrust laws. The intent of this article is to discuss the impact of recent developments in antitrust law and its actual effect on deterring antitrust violations.

The *Antitrust Criminal Penalty Enhancement and Reform Act*<sup>2</sup> ('ACPERA') is believed to:

[Increase] significantly the penalties for criminal violations of antitrust laws, raised fines on individuals and corporations that commit antitrust violations, and bolstered incentives for individuals and corporations to self-report antitrust violations in order to take advantages of the DOJ's amnesty program.<sup>3</sup>

Despite the substantial civil and criminal penalties provided by the ACPERA, antitrust violations still plague the market and there is frequent recidivism among offenders.<sup>4</sup> Since many antitrust violations go undetected, studies discussing the effectiveness of an antitrust enforcement program are inherently problematic; 'however that data consistently suggests that despite the growth in fines and the introduction of criminal penalties, current antitrust sanctions are an insufficient deterrent'.<sup>5</sup> Various studies have placed detection in the US between thirteen and, more optimistically, thirty-three percent

---

\* Bachelor of Criminology (Florida State University), Juris Doctor (American University, Washington College of Law) Attorney at Nelson, Bryan, and Jones.

<sup>1</sup> *US v Topco Associates Inc*, 405 US 596, 610 (1972).

<sup>2</sup> *Antitrust Criminal Penalty and Reform Act of 2004*, Pub L No 108-237, 118 Stat 661.

<sup>3</sup> Joseph Safar, *Antitrust & Trade Regulation* (July 2004) Kirkpatrick and Lockhart LLP <<http://www.klgates.com>>.

<sup>4</sup> Douglas Ginsberg and Joshua Wright, 'Antitrust Sanctions' (2010) 6(2) *Competition Policy International* 2, 30.

<sup>5</sup> *Ibid* 4.

worldwide.<sup>6</sup> The evidence also suggests that firms regularly abuse the leniency program to punish their competitors, while also receiving amnesty from prosecution.<sup>7</sup>

Traditionally, deterrence practices included imposing sanctions against corporations responsible for committing antitrust violations.<sup>8</sup> However, this approach fails to take into account the fact that corporations will continue to commit antitrust violations as long as it is profitable and the individuals responsible for the violations will not be held personally accountable. Rather, antitrust sanctions should instead be focused on imposing criminal and civil penalties to those individuals committing antitrust violations on the corporation's behalf.

Since the 1970s, the DOJ's Antitrust Division has increasingly relied on corporate civil fines and individual criminal sanctions to deter antitrust violations.<sup>9</sup> Between 1970 and 1979 the total cost of civil fines paid by companies and individuals found guilty of committing antitrust violations was US\$48 million. That number rose to US\$188 million between 1980 and 1989 and again to US \$1.6 billion between 1990 and 1999. Most recently, that number has risen to US\$4.2 billion between 2000 and 2009.<sup>10</sup> Criminal antitrust fines have also progressively increased since the ACPERA was passed.<sup>11</sup> The total

---

<sup>6</sup> Ibid 7–8, citing Peter Bryant and E Woodrow Eckard, 'Price Fixing: The Probability of Getting Caught' (1991) 73 *Review of Economics and Statistics* 531; Nathan H Miller, 'Strategic Leniency and Cartel Enforcement' (2009) 99(3) *American Economic Review* 750, 760.

<sup>7</sup> See generally Daniel Sokol, 'Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement' (2012) 78 *Antitrust Law Journal* 203.

<sup>8</sup> Douglas Ginsberg and Joshua Wright, 'Antitrust Sanctions' (2010) 6(2) *Competition Policy International* 5.

<sup>9</sup> Scott Hammond, 'The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades' (Speech delivered at the 24<sup>th</sup> Annual National Institute on White Collar Crime, Eden Roc Renaissance Miami, Florida, 25 February 2010) <<http://www.justice.gov/atr/public/speeches/255515.htm>>.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid (the ACPERA was passed in 2004).

fine amounts in 2004 was US\$350 million, US\$338 million in 2005, US\$473 million in 2006, US\$630 million in 2007, US\$701 million in 2008 and US\$100 billion in 2009.<sup>12</sup>

Criminal sanctions imposed against individuals are also available under the ACPERA, and provide that an individual can be imprisoned for three to seven years.<sup>13</sup> The challenge in enforcing antitrust laws is to structure the enforcement of these various civil and criminal penalties against the individuals and corporations who commit them to achieve what lawmakers consider 'optimal total deterrence'.<sup>14</sup> First, total sanction should be significant, but not greater than necessary to take the profit out of price fixing. If the corporation benefits from committing antitrust violations, the corporation will continue to commit antitrust violations so long as the business as a whole can still make a profit and write the penalty off as a legitimate business cost. Second, antitrust deterrence efforts should be focused on the individual, not the corporation, for committing antitrust sanctions. This point is largely supported by quantifiable evidence that shows individual sanctions are a more effective deterrent than corporate civil fines.<sup>15</sup>

This article also suggests the use of bright-line standards for the interpretation of 'satisfactory cooperation', which will help practitioners better understand when it would be appropriate to seek protection under the leniency program. Part II of this article will discuss the background and historical development of antitrust laws. Part III will analyse civil and criminal penalties for antitrust violations, the DOJ Amnesty Program and their cooperative effect on actually deterring corporations from committing antitrust violations.

---

<sup>12</sup> Ibid.

<sup>13</sup> Joseph Safer, *Antitrust & Trade Regulation*, K & L Gates Alerts (1 July 2014) <<http://www.klgates.com/antitrust-competition--trade-regulation-practices/>>.

<sup>14</sup> Ginsberg and Wright, above n 8, 5 (the author suggests that optimal total sanctions can be achieved by balancing appropriate sanctions imposed against corporations and individuals to effectively eliminate any benefit gained from a prospective antitrust violation).

<sup>15</sup> Ginsberg and Wright, above n 8.

Further, Part IV will recommend that the imposition of criminal sanctions against individuals responsible for committing antitrust violations is the most effective way to prevent corporate antitrust violations and that more specific requirements are needed to satisfy the 'satisfactory cooperation' regime under the DOJ's Amnesty Program.

## II THE BACKGROUND AND DEVELOPMENT OF ANTITRUST LAWS IN THE UNITED STATES

Since the *Sherman Act* was first passed, the antitrust laws in the US have been continuously amended to increase criminal and civil sanctions<sup>16</sup> Congress passed the ACPERA in 2004, which significantly increased civil and criminal fines for individuals and corporations found guilty of committing antitrust violations.<sup>17</sup> The ACPERA has also created a corporate leniency program, which provides protections for corporations and individuals who expose antitrust violations.<sup>18</sup> These will be discussed below.

### *A The history and development of civil and criminal penalties under antitrust laws*

The *Sherman Act* was passed in 1890 to protect interstate commerce by prohibiting the direct or indirect interference with the freely competitive interstate production and distribution of goods.<sup>19</sup> Section 1 of the *Sherman Act* makes it unlawful for corporations and individuals to engage in behaviour that would restrain trade or commerce in the US or with foreign nations.<sup>20</sup> Any individual or

---

<sup>16</sup> Ibid 4 (in 1987 antitrust fines were capped at one hundred thousand for individuals and one million dollars for corporations, those fines have consistently risen to their current levels which are one million dollars for individuals and one hundred million dollars for corporations).

<sup>17</sup> Safer, above n 13, 1.

<sup>18</sup> Ibid.

<sup>19</sup> Bryan A Garner, *Black's Law Dictionary* (Thomson West, 10<sup>th</sup> ed, 2014) 1588.

<sup>20</sup> *Sherman Act* 15 USC § 1 (2004).

corporation who violates the statute is guilty of a felony and can 'be punished by a fine not exceeding US\$100,000,000 if a corporation, or, if any other person, US\$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court'.<sup>21</sup> In *Associated Gen Contractors of California Inc v California State Council of Carpenters*, the US Supreme Court found that a contractors association engaged in behaviour that would restrain trade by coercing third parties into entering business agreements with non-union members.<sup>22</sup> The Court held:

Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect.<sup>23</sup>

Section 2 makes it unlawful for corporations to form monopolies or to monopolise interstate or international trade or commerce.<sup>24</sup> Section 3 combines ss 1 and 2 and makes behaviour that results in restraint of trade and the formation of a monopoly a felony.<sup>25</sup> Courts have held that

[T]he two prerequisites to showing of actual monopolization under sections 1-7 are:

1. The possession of monopoly power in the relevant market; and
2. Wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident; if the first element is absent the analysis need proceed no further.<sup>26</sup>

---

<sup>21</sup> Ibid.

<sup>22</sup> *Associated Ge. Contractors of California Inc v California State Council of Carpenters*, 459 US 519 (1983).

<sup>23</sup> Ibid 528 (Stevens J).

<sup>24</sup> *Sherman Act* 15 USC § 2 (2004).

<sup>25</sup> *Sherman Act* 15 USC § 3 (2004).

<sup>26</sup> See *Twin City Sportservice Inc v Charles O Finley & Co* 512 F2d 1264, 1274 (9<sup>th</sup> Cir, 1975); *Gold Fuel Service Inc v Esso Standard Oil Co* 306 F2d 61, 65 (3d Cir, 1962).

When determining sanctions under these statutes, courts and law enforcement agencies have relied on civil fines as a primary cure for antitrust violations.<sup>27</sup> Initially, antitrust fines were limited at US\$100,000 for individuals and US\$1,000,000 for corporations.<sup>28</sup> This was amended in 1990, increasing the maximum for a personal fine to US\$350,000 and the maximum corporate fine to US\$10 million.<sup>29</sup>

In 1914, Congress passed the *Federal Trade Commission Act* 15 USC §§ 41-58 ('*FTC Act*') and *Clayton Act* 15 USC §§ 12-27 ('*Clayton Act*') to supplement the antitrust provisions of the *Sherman Act*.<sup>30</sup> Under the *FTC Act*, the Federal Trade Commission ('FTC') has jurisdiction to prevent individuals and corporations from 'using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce'.<sup>31</sup> While the FTC's jurisdiction is broad enough to cover all violations of the *Sherman Act*, many unfair methods of competition do not fall under its scope.<sup>32</sup>

The *Clayton Act* provides further substance to the *Sherman Act* by addressing specific practices that the Act does not clearly prohibit,<sup>33</sup> including price discrimination that lessens competition or creates a monopoly and exclusive dealings that restrict competition.<sup>34</sup> The *Clayton Act* also authorises private parties to sue for triple damages when they have been harmed by conduct that violates either the *Sherman Act* or the *Clayton Act*.<sup>35</sup> With some revisions, the *Sherman Act*, the *Clayton Act* and the *FTC Act* are the three primary federal

---

<sup>27</sup> Ginsberg and Wright, above n 8, 4.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Federal Trade Commission, *The Antitrust Laws* (28 February 2015) <<http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>>.

<sup>31</sup> *Sherman Act* 15 USC § 41(a)(2).

<sup>32</sup> *Federal Trade Commission v Cement Institute*, 333 US 683, 694 (1948).

<sup>33</sup> Federal Trade Commission, above n 30.

<sup>34</sup> *Sherman Act* 15 USC §§ 13-14.

<sup>35</sup> *Sherman Act* 15 USCA § 15a.

antitrust laws in effect today.<sup>36</sup> In addition to these federal statutes, most States have their own antitrust laws that provide criminal and civil penalties for antitrust violations; many of these statutes are based on the federal antitrust laws.<sup>37</sup>

The government has also relied on the ‘alternative fine’ provision of 18 USC § 3571(d), when seeking to impose substantial fines for violations of antitrust laws.<sup>38</sup> Section 3571(d) authorises fines of up to ‘twice the gross gain or twice the gross loss’, when a defendant has been found guilty of a criminal offence.<sup>39</sup> Using § 3571(d), the government has obtained US\$100,000,000 resulting from five fines agreed to by defendants found guilty of committing antitrust violations.<sup>40</sup> However, the government’s reliance on § 3571(d) is not without difficulty; the prosecution must prove a violation beyond a reasonable doubt, the standard for a criminal case, rather than the civil standard of preponderance of the evidence. The prosecution also must prove that actual amount of the gross gain or loss requested when determining damages.<sup>41</sup>

### *B Recent developments*

President Bush enacted the most recent change in antitrust laws when he signed in the ACPERA in 2004.<sup>42</sup> This increased the maximum corporate fine to US\$100 billion and the maximum jail sentence from three years (which it had been since 1974) to ten years.<sup>43</sup> Since the passage of the ACPERA, the DOJ’s antitrust division has increasingly relied on criminal sanctions as part of its enforcement program.<sup>44</sup> The graphs below show the recent trends in criminal sanctions imposed on defendants found guilty of committing antitrust violations.

---

<sup>36</sup> Federal Trade Commission, above n 30.

<sup>37</sup> *Ibid.*

<sup>38</sup> Safer, above n 13, 1.

<sup>39</sup> 18 USC 3571(d).

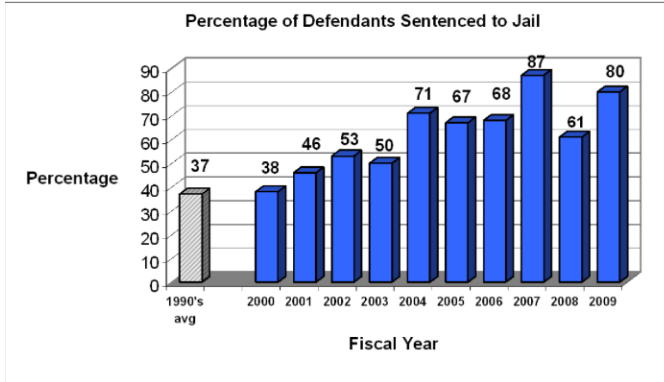
<sup>40</sup> Safer, above n 13, 1.

<sup>41</sup> *Ibid.*

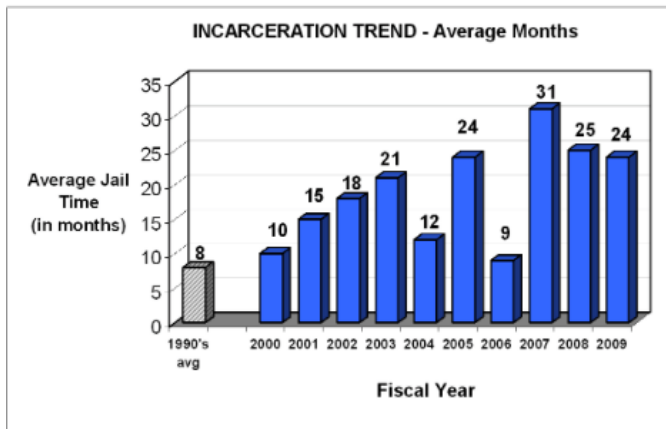
<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> Hammond, above n 9.



1 Percentage of Defendants Sentenced to Jail<sup>45</sup>

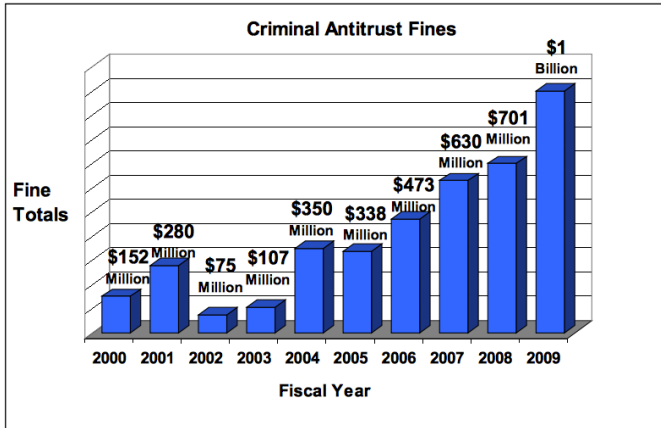


2 Incarceration Trend<sup>46</sup>

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

These graphs show that the total number of defendants incarcerated and the average term of incarceration have increased significantly and consistently with the passage of the ACPERA. The total amount of fines imposed in criminal cases has also increased significantly.



3 Criminal Antitrust Fines<sup>47</sup>

### *C History and development of the DOJ leniency program*

The ACPERA has also substantially expanded the DOJ's corporate leniency program.<sup>48</sup> The leniency program grants immunity to a corporation or individual who has provided 'satisfactory cooperation' by:

1. providing a full account of relevant facts;

---

<sup>47</sup> Ibid.

<sup>48</sup> Safer, above n 13, 1 (under the ACPERA, a successful leniency applicant will be immune from criminal and civil sanctions after successfully completing the terms of the leniency program).

2. furnishing all documents or other items relating to the antitrust scheme; and
3. making a good faith effort by assisting in the prosecution of other corporations or individuals who were involved in the antitrust scheme.<sup>49</sup>

‘The leniency program operates under the theory that self-reporting should lead to reduced sanctioning by the government’.<sup>50</sup> Many articles have analysed the effects the leniency program has had on reducing antitrust violations using a ‘game-theoretic’ approach.<sup>51</sup> These articles suggest that the members of an antitrust conspiracy will be incentivised to defect given the benefits of the leniency program.<sup>52</sup> Other studies have also found that threats of criminal penalties are the primary motivating factor for individuals considering the leniency program.<sup>53</sup>

The corporate leniency program was first introduced by the DOJ in 1978.<sup>54</sup> At the program’s inception, few corporations or individuals chose to participate in the program because it lacked incentives.<sup>55</sup> There had not been a single corporate fine that exceeded US \$2 million for violations of the *Sherman Act* until the maximum fines were increased to US \$10 million for corporations and US \$350,000 for individuals in 1990.<sup>56</sup> The corporate leniency policy of 1993 and

---

<sup>49</sup> *Antitrust Criminal Penalty and Reform Act of 2004*, Pub L No 108-237, 118 Stat 661.

<sup>50</sup> Ginsberg and Wright, above n 8, 4.

<sup>51</sup> Sokol, above n 7, 204.

<sup>52</sup> *Ibid.*

<sup>53</sup> Criminal Cartel Enforcement, *GAO-11-619: Stakeholder Views on Impact of 2004 Antitrust Reform Act, but Support Whistleblower Protection 1*, 15 (2011).

<sup>54</sup> Sokol, above n 7, 204 (an analysis of the leniency program over times shows that the current leniency program is the most successful).

<sup>55</sup> *Ibid* citing Joseph Gallo et al, ‘Criminal Penalties Under the Sherman Act: A Study of Law and Economics’ (1994) 16 *Research in Law and Economics* 25, 59.

<sup>56</sup> Sokol, above n 7, 204 citing J Anthony Chavez, ‘More Aggressive Action to Curb International Cartels’ (2009) 1739 *Practising Law*

the individual leniency policy of 1994 caused a fundamental shift in antitrust enforcement.<sup>57</sup> The leniency program has now become the principle antitrust enforcement program.<sup>58</sup>

The DOJ's leniency program can be separated into two distinct groups: Type A and Type B.<sup>59</sup> Type A leniency is available to corporations and individuals reporting antitrust violations before the DOJ has received the same information from another source, or before the DOJ has begun its own investigation.<sup>60</sup> Type B leniency is available for applicants reporting antitrust violations after the DOJ has received information about the activity from another source, whether this is before or after the DOJ has begun an investigation.<sup>61</sup> In addition to both Type A and B leniency, the DOJ has also granted 'amnesty plus' leniency to applicants already under investigation that report an antitrust violation in a separate conspiracy.<sup>62</sup>

To apply for either type of leniency, the applicant must report the antitrust violation to the DOJ and will then be given a 'marker' for an established period of time that will hold their place as the first to expose a conspiracy, while their legal counsel gathers additional information in support of the leniency application.<sup>63</sup> Once the application is submitted to the DOJ and evidence of an antitrust violation is found, the applicant's request for leniency is granted on the condition that the applicant continues to assist the DOJ as they prepare for trial.<sup>64</sup> Shortly after the DOJ files criminal charges, the case proceeds to trial with the continued assistance of the leniency

---

*Institute: Corporate Law and Practice Course Handbook Series* 807, 830.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> J Anthony Chavez, 'More Aggressive Action to Curb International Cartels' (2009) 1739 *Practising Law Institute: Corporate Law and Practice Course Handbook Series* 807, 814.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid 816.

<sup>64</sup> Ibid 815.

applicant.<sup>65</sup> Once the trial is complete and the leniency applicant has satisfied all conditions of the leniency agreement, the DOJ grants final leniency to the applicant.<sup>66</sup>

Besides these general guidelines, corporations and individuals applying for leniency under the DOJ's Amnesty Program are only given general guidance as to what conduct satisfies the 'satisfactory cooperation' requirement.<sup>67</sup> Specifically, that language requires the applicant to have provided satisfactory cooperation to the claimant with respect to the civil action.<sup>68</sup>

A seminal case demonstrating this requirement is *In re Sulfuric Acid Antitrust Litigation*.<sup>69</sup> This case discusses the necessary conditions for the entry of an order of satisfactory cooperation. However, it does not offer much insight into the necessary conditions because the plaintiffs and defendants had agreed to the defendants' satisfactory cooperation.<sup>70</sup> The amnesty applicants entered into a 'cooperation agreement' with the plaintiffs pursuant to the ACPERA.<sup>71</sup> The Court determined that the cooperation agreement tracked the language of ACPERA, requiring a defendant to use 'its best efforts to secure and facilitate from cooperating witnesses' their 'availability for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require'.<sup>72</sup>

---

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> See *Antitrust Criminal Penalty Enhancement and Reform Act of 2004*, Pub. L. No. 108-237, § 213(b), 118 Stat. 661 (2004).

<sup>68</sup> Ibid.

<sup>69</sup> *In re Sulfuric Acid Antitrust Litigation*, 231 FRD 320 (ND Ill, 2005).

<sup>70</sup> Amy Manning, 'ACPERA—Eight Years Later, "Satisfactory Cooperation" Lacks a "Satisfactory" Definition' (Paper presented at the American Bar Association Section of Antitrust Law and the International Bar Association 2012 International Cartel Workshop, 2012) 5  
<<http://www.mcguirewoods.com/news-resources/publications/antitrust/ACPERA-Eight-Years-Later.pdf>>.

<sup>71</sup> *In re Sulfuric Acid Antitrust Litigation* 231 FRD 320 (ND Ill, 2005).

<sup>72</sup> Ibid 328.

In another case, plaintiffs attempted to force a previously unidentified amnesty applicant to reveal itself or lose the protections of the ACPERA.<sup>73</sup> The Court rejected the plaintiff's attempt to expose the amnesty applicant, holding the plaintiff had failed to identify any relevant statute supporting their claim.<sup>74</sup> However, the Court did acknowledge the timeliness of the amnesty applicant's cooperation would be taken into account at the time the court determined 'satisfactory cooperation'.<sup>75</sup> A recent study found '[t]he statute does not provide a definition of "satisfactory cooperation", nor does it provide specific guidance on the amount of cooperation required and exactly when ACPERA cooperation must begin and end'.<sup>76</sup> Additionally, 'differing views on the timing and amount of ACPERA cooperation have resulted in challenges such as disputes about delayed cooperation'.<sup>77</sup>

### III AN ECONOMIC ANALYSIS OF CURRENT TRENDS CIVIL AND CRIMINAL PUNISHMENT

It is inherently difficult to determine when antitrust violations actually occur.<sup>78</sup> Accordingly, any empirical evidence discussing the actual deterrence rate of current US antitrust policies can be interpreted in multiple ways.<sup>79</sup> There is also evidence that antitrust class actions filed in the Federal Court are 'now in steep decline after rising substantially during the past decade'.<sup>80</sup> While antitrust policy

---

<sup>73</sup> Manning, above n 70, 5.

<sup>74</sup> Ibid 4.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid 12 citing Criminal Cartel Enforcement, *GAO-11-619: Stakeholder Views on Impact of 2004 Antitrust Reform Act, but Support Whistleblower Protection* 1, 30 (2011).

<sup>77</sup> Ibid 12 citing Criminal Cartel Enforcement, *GAO-11-619: Stakeholder Views on Impact of 2004 Antitrust Reform Act, but Support Whistleblower Protection* 1, 2.

<sup>78</sup> Ginsberg and Wright, above n 8, 7.

<sup>79</sup> Ibid.

<sup>80</sup> Donald Hawthorne, 'Recent Trends in Federal Antitrust Class Action Cases' (2010) 24 *Antitrust* 58.

studies can be inherently subjective to the researcher, there are many theories which could lend any of them support. Of these, an economic analysis of criminal and civil sanctions can best determine the most appropriate sanction to adequately deter antitrust violations.

‘The economic analysis of optimal legal sanctions and criminal punishments is built upon the foundational insight that penalties should be sufficient to induce offenders to realising the full social cost of their crime, and effectively deter them from committing crimes in the future’.<sup>81</sup> In a simple setting, where detection of crimes and enforcement costs are both perfect and costless, the optimal sanction will be equal to the total social harm of the crime.<sup>82</sup> In a more realistic setting, in which the probabilities of both detection and of punishment are less than perfect and enforcement costs are positive, optimal penalties must exceed the social cost of the crime so that the expected sanction facing each potential violator is equal to the harm his violation has caused.<sup>83</sup>

The question remains – what factors should parties consider when determining optimal sanctions? In many cases the legal playing field determines the appropriate sanctions. The decision as to whether civil or criminal sanctions (or a combination therein) will be more appropriate will likely come down to whether the facts of the case will support the burden of proof required for a judgment in the plaintiff’s favour.

Under the *Sherman Act*, the DOJ and private parties can pursue civil sanctions for damages resulting from an antitrust violation.<sup>84</sup> In *Bell Atlantic Corp v Twombly*,<sup>85</sup> the Supreme Court established the

---

<sup>81</sup> Ginsberg and Wright, above n 8, 7 citing Gary Becker, ‘Crime and Punishment: An Economic Approach’ (1968) 76 *Journal of Political Economy* 169; see also William M Landes, ‘Optimal Sanctions for Antitrust Violations’ (1983) 50 *University of Chicago Law Review* 652.

<sup>82</sup> Ginsberg and Wright, above n 8, 7.

<sup>83</sup> Ibid.

<sup>84</sup> Sokol, above n 7, 204.

<sup>85</sup> *Bell Atlantic Corp v Twombly*, 127 US 1955, 1965–68 (2007).

heightened burden of proof a party was required to establish to survive a motion to dismiss in an antitrust case. The Court's finding in that case effectively made it easier for defendants have their motions to dismiss granted by courts.<sup>86</sup> Since antitrust violations frequently go unnoticed, a party seeking damages under the *Sherman Act* might not easily meet this burden.<sup>87</sup>

Under the *Sherman Act*, the DOJ can also pursue criminal sanctions against defendants in antitrust cases.<sup>88</sup> In the six years after the ACPERA was passed, a higher proportion of defendants have been sentenced to jail in criminal antitrust cases.<sup>89</sup> Additionally, the total jail time and medial jail sentences have also increased.<sup>90</sup> The DOJ contributes their increased reliance on incarceration to the increased criminal sanctions provided by the ACPERA.<sup>91</sup>

*A Current Sanctions are not effectively deterring corporations or individual from committing antitrust violations*

There is no indication that the drastic increase in criminal and civil penalties under the ACPERA has caused a significant decline in antitrust violations.<sup>92</sup> Civil fines are unlikely to effectively deter antitrust violations committed by an individual when the corporation

---

<sup>86</sup> Criminal Cartel Enforcement, *GAO-11-619: Stakeholder Views on Impact of 2004 Antitrust Reform Act, but Support Whistleblower Protection* 1, 12 (2011).

<sup>87</sup> Ginsberg and Wright, above n 8, 7.

<sup>88</sup> Sokol, above n 7, 204.

<sup>89</sup> Criminal Cartel Enforcement, *GAO-11-619: Stakeholder Views on Impact of 2004 Antitrust Reform Act, but Support Whistleblower Protection* 1, 24 (2011).

<sup>90</sup> Ibid.

<sup>91</sup> Ibid 25 (other factors include cooperative relationships with foreign government, a policy shift toward prosecution of additional culpable individuals, the elimination of 'no-jail' deals for defendants, and judges recently imposing tougher sentences).

<sup>92</sup> Ginsberg and Wright, above n 8, 14.

is able to completely internalise the entire fine imposed against the business.<sup>93</sup>

According to a recent study, average antitrust conspiracies last six years.<sup>94</sup> This study suggests that these conspiracies persist for so long because price-fixing is more profitable than was previously thought,<sup>95</sup> which in turn suggests the need for greater sanctions. Put simply, this study argues that the decision to commit antitrust violations is driven by a rational cost/benefit analysis. Under this theory, a business will continue to commit antitrust violations so long as it remains profitable.

Critics of this argument suggest that sanctions exist that can prevent antitrust violations.<sup>96</sup> Judge Richard Posner proposed that price-fixing is ultimately punished exclusively through corporate fines, and ‘only when a company is unable to pay an optimal fine should imprisonment be imposed as a last resort and only if the individuals are unable to pay the fine’.<sup>97</sup> Other practitioners argue that criminalisation of price-fixing offences would be a better deterrence. One argument suggests the ‘publicity about severe sentences for price fixing may help educate other corporate executives about the true individual and corporate legal risks of being caught while also contributing to the effectiveness and cost of corporate antitrust compliance programs’.<sup>98</sup>

However, civil fines, or at least the implementation of them, do not seem to adequately deter antitrust violations. The fluctuation of a corporation’s stock price after a firm is indicted for committing an

---

<sup>93</sup> Ibid.

<sup>94</sup> Ibid; see also Margaret Levenstein and Valerie Wright, ‘What Determines Cartel Success?’ (2006) 44 *Journal of Economic Literature* 43, 49–50.

<sup>95</sup> Ginsberg and Wright, above n 8, 14 citing George Stigler, ‘A Theory of Oligopoly’ (1964) 72(1) *Journal of Political Economy* 44, 46.

<sup>96</sup> John M Connor and Robert H Lande, ‘Cartels as a Rational Business Strategy: Crime Pays’ (2012) 34 *Cardozo Law Review* 427, 438.

<sup>97</sup> Ibid 436.

<sup>98</sup> Ibid.

antitrust violation also suggests civil fines provide an inadequate deterrence.<sup>99</sup> A well documented empirical regularity is that share values in indicted firms initially fall significantly but the stock price of an overwhelming majority of indicted firms returns to pre-indictment levels within one year.<sup>100</sup> These results are consistent with firms indicted between 1962 and 2000.<sup>101</sup> Given the substantially greater corporate fines that were imposed during the latter half of that period, the consistency of the stock price recovery across that time suggests increased sanctions do not significantly deter antitrust violations.<sup>102</sup>

Regardless of the amount of the fine, it seems civil sanctions do not have more than a transitory impact upon the profitability of a business. Another recent study also suggests that civil sanctions have little to no deterrent value. The study identified several companies that average one or more antitrust civil judgements annually between 1990-2015.<sup>103</sup>

1 *The world's leading recidivist for corporations that commit antitrust violations.*<sup>104</sup>

Company Name	Number of Judgments Worldwide 1990-2000.
BASF	26

---

<sup>99</sup> Ginsberg and Wright, above n 8, 14.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid citing John S Thompson and David L Kaserman, 'After the Fall: Stock Price Movements and the Deterrent Effect of Antitrust Enforcement' (2001) 19(3) *Review of Industrial Organization* 339.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid citing John M Connor and C Gustav Helmers, 'Statics on Private International Cartels, 1990–2005' (Working Paper No 07–01, American Antitrust Institute, 10 January 2007) 23  
<[https://papers.ssrn.com/sol3/papers.cft?abstract\\_id=1103610](https://papers.ssrn.com/sol3/papers.cft?abstract_id=1103610)>.

Total SA (Totalfina, Elf, Atofina)	18
E Hoffman-La Roche	17
Azko Nobel	14
Aventis	14
ENI	14
Shell	14
Degusa (Evonik)	13
Bayer	11
Mitsubishi	10
Mitsui	10

Evaluating this data, the study concludes:

Monetary sanctions imposed [upon companies who commit antitrust violations] have been the highest in antitrust history. ... extensive recidivism implies that present ... sanctions are inadequate to deter [antitrust violations].<sup>105</sup>

The study further found that:

Even under the most optimistic assumptions about discovery, leniency and prosecution rates, corporations have found price fixing schemes to be profitable... [T]o ensure optimal deterrence, total financial sanctions should be greater than four times the expected profit one would expect from a price fixing scheme to optimally deter antitrust violations.<sup>106</sup>

Put simply, for a civil fine to adequately deter antitrust violations, the fine must certainly take the profit out of committing antitrust violations.

#### *B An analysis of the ACPERA's corporate leniency program*

One of the most significant expansions of the DOJ's antitrust enforcement program came with the ACPERA's changes to the

---

<sup>105</sup> Ibid 38.

<sup>106</sup> Ibid 15–16.

DOJ's corporate and individual leniency program. Under the ACPERA's leniency program, corporations and individuals who expose antitrust violations are protected from criminal prosecution, and are only required to pay limited damages in civil litigation.<sup>107</sup> The program saves the cost of litigation and prevents government agencies and firms seeking damages for antitrust violations, as well as providing streamlined access to the evidence needed for litigation. Leniency in conjunction with civil and criminal sanctions has shown quantifiable success, civil fines have risen into the billions and the percentage of defendants incarcerated for committing antitrust violations has also increased.<sup>108</sup>

Before considering the protections of the leniency program, applicants typically conduct a cost/benefit analysis of their options under the program.<sup>109</sup> The greater the risk involved in disclosures to the DOJ, the more likely a potential applicant will risk continued involvement in the antitrust conspiracy.<sup>110</sup> This is especially risky because in some cases a potential applicant may not even know the extent of their own involvement in the conspiracy, further increasing the risks of disclosure.<sup>111</sup>

An analysis of leniency cases since the ACPERA was enacted in 2004 and indicates there has been little change in the number of applications submitted by businesses and individuals.<sup>112</sup> However, there have been nearly twice as many successful applicants apply for Type A leniency.<sup>113</sup> Between 1998 and 2004, a total of 54 successful leniency applications were submitted by corporations and individuals to the DOJ; 17 received Type A leniency, 23 received Type B

---

<sup>107</sup> Safar, above n 3, 1.

<sup>108</sup> Hammond, above n 9, 13.

<sup>109</sup> Sokol, above n 7, 212.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> Criminal Cartel Enforcement, *GAO-11-619: Stakeholder Views on Impact of 2004 Antitrust Reform Act, but Support Whistleblower Protection* 1, 15.

<sup>113</sup> *Ibid.*

leniency and 14 applicants received Amnesty plus.<sup>114</sup> During the five years after the ACPERA, there were a total of 56 leniency applications submitted; of those, 33 received Type A leniency, 13 received Type B leniency and 10 applicants received Amnesty plus.<sup>115</sup> The significant rise in type A applicants proves that the current leniency program reveals more antitrust violations with less work from the DOJ.

Though the leniency program has shown quantifiable success, the program is not without fault. Other factors may have also affected the number and types of leniency applications submitted to the DOJ. For example, some applicants are seeking the protections of Type A leniency in circumstances where they believe a co-conspirator is likely to disclose evidence of the applicant's involvement in the conspiracy to the DOJ.<sup>116</sup> Other indirect factors have also affected the leniency programs success. For example, international applicants have simultaneously applied for leniency in multiple countries where they could face criminal prosecution.<sup>117</sup> In addition, since antitrust violations frequently occur during economic depression, economic factors also affect the total number of leniency applicants.<sup>118</sup>

Finally, a leniency policy that is too generous may create an opportunity for a business to use the program strategically.<sup>119</sup> The applicants that apply for leniency use that leniency to punish their co-conspirators who are often competitors in the same market.<sup>120</sup> For example, consider a situation where a leniency applicant turns over evidence that he and his co-conspirators have been strategically raising the resale prices of their goods as part of a price fixing scheme. By strategically gaming the leniency program, the applicant could effectively use the program to clear competitors out of a specific

---

<sup>114</sup> Ibid 19.

<sup>115</sup> Ibid.

<sup>116</sup> Sokol, above n 7, 205.

<sup>117</sup> Ibid 210.

<sup>118</sup> Ibid 210.

<sup>119</sup> Ibid 212.

<sup>120</sup> Ibid.

market, while shielding the applicant from criminal and civil sanctions.<sup>121</sup>

The general terms of the statute itself, and the lack of case law development regarding the ACPERA, has left parties in the dark regarding the specific requirements for leniency under the ACPERA. To be granted leniency, a business or individual must meet all the statutory requirements of the ACPERA, and provide ‘satisfactory cooperation’ during the criminal and civil proceedings against the co-conspirator.<sup>122</sup> Typically, amnesty applicants are negotiating their own terms of ‘satisfactory cooperation’ with adverse parties; they use their leniency protections as a negotiating point in early settlements with plaintiffs.<sup>123</sup> In this manner, parties have avoided the need to go to court for a finding on satisfactory cooperation, because parties have already created their own agreed upon definition.<sup>124</sup> While great strides have been made in antitrust enforcement with the leniency program, there is clear evidence that a few changes to the current program will increase the programs overall effectiveness in detecting and deterring antitrust violations.

#### IV MOVING FORWARD: NECESSARY MODIFICATION TO THE EXISTING ANTRITRUST SANCTIONS

Since the *Sherman Act* was first enacted, great strides have been made to punish corporations and individuals who commit antitrust violations. Antitrust enforcement agencies and private parties have traditionally relied on civil fines to enforce antitrust regulations.<sup>125</sup> Most recently, the ACPERA has increased civil fines to US \$100 million for businesses and US \$1 million for individuals.<sup>126</sup> Despite these large and ever increasing fines, antitrust violations are still

---

<sup>121</sup> Ibid.

<sup>122</sup> See *Antitrust Criminal Penalty and Reform Act of 2004*, Pub L No 108–237, 118 Stat 661.

<sup>123</sup> Manning, above n 69, 5.

<sup>124</sup> Ibid see, eg, *In re Mun Derivatives Antitrust Litigation*, 252 FRD 184 (SDNY 2008).

<sup>125</sup> Ginsberg and Wright, above n 8, 14.

<sup>126</sup> Safar, above n 3, 1.

prevalent and recidivism among offenders still exists.<sup>127</sup> More interesting, the leniency program is susceptible to abuse by corporations that can game the system to punish their co-conspirators.<sup>128</sup>

‘The success of any antitrust enforcement program is substantially linked to the creation and effective implementation of a compliance culture’.<sup>129</sup> This article proposes significant changes to the antitrust enforcement programs. First, in an effort to reduce the number of antitrust violations, prosecutions should be focused on the individuals responsible for committing antitrust sanctions, rather than their corporations for whom they acted on behalf. Second, the DOJ’s Amnesty Program should mandate specific requirements to fulfil the ‘satisfactory cooperation’ requirement.

*A Punishments should be focused on the individual*

In order for antitrust sanctions to be effective, they must be performing at an optimal level. Since antitrust violations are difficult to detect and enforcement is equally expensive and time consuming, enforcement efforts must be focused specifically to where they can be the most effective. For optimal total deterrence to occur, antitrust enforcement efforts should be aimed at the individual, rather than the corporations who commit antitrust violation.

When a corporation is found to have committed an antitrust violation, the corporation is typically forced to pay civil fines to injured parties. Under this rationale, it is the shareholders (who typically have no role or influence in the decision making of the corporation) that end up compensating injured parties. As discussed above, recent studies have also shown corporations are able to financially recover as quickly as a year after paying fines for committing antitrust violations.

In light of increasing fines, why is recidivism among corporations so frequent? The current corporate antitrust structure is as follows:

---

<sup>127</sup> Ginsberg and Wright, above n 8, 4.

<sup>128</sup> Sokol, above n 7, 203.

<sup>129</sup> Ibid.

‘Directors overseeing the officers, who manage the employees; Shareholders who are passive investors that have no influence in the day-to-day operations of the firm largely fund the venture’.<sup>130</sup>

Enforcement agencies such as the DOJ and FTC monitors, investigate and enforce antitrust laws.<sup>131</sup> Absent any insight into a particular corporation, enforcement agencies are unable to know at what level an antitrust violation occurred.<sup>132</sup> Without any insider knowledge, it is difficult to determine the market manipulation practices of a single corporation, let alone an entire antitrust conspiracy involving multiple corporations.<sup>133</sup>

So the question becomes – what corporate employees should be responsible for deterring antitrust violations? The officers and directors of a corporation will profit from an antitrust conspiracy as long as the corporation is able to come out ahead financially. They may also earn bonuses or raises and their shares will also become more valuable with the corporations overall value.<sup>134</sup> Shareholders typically cannot prevent antitrust violations committed by the corporation, and likely would not sell shares that have become more valuable as a result of the antitrust violation.<sup>135</sup> Since corporations will continue to commit antitrust violations as long as it remains profitable, and individuals will not be held accountable, civil fines are not likely to deter a firm from committing antitrust violations. Therefore, to achieve optimal deterrence it makes sense for sanctions to target the individual employee and not the company as a whole.

Although charging a corporate manager or director with ensuring compliance with antitrust laws seems like a quick and easy solution, it makes sense to target the actual employee who commits the violation for two reasons. First, the employee who committed the

---

<sup>130</sup> Ibid 17.

<sup>131</sup> Ginsberg and Wright, above n 8, 17.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Sokol, above n 7, 203.

<sup>135</sup> Ibid.

violation himself, should be responsible for the end result of it.<sup>136</sup> Second, because an employee has less ‘skin in the game’ than a manager or director, they have less to gain from committing a potential violation.<sup>137</sup> Alternatively, a manager or director who fails to properly supervise an employee committing an antitrust violation should also be held accountable for the end result of the violation.<sup>138</sup> Similarly, those who are complacent in a price fixing scheme without rising to the level of perpetrator, such as an aider or abettor, should also be appropriately sanctioned.<sup>139</sup>

The optimal sanction for an employee responsible for committing an antitrust violation will likely depend on the specific circumstances of the case, especially when determining damages. However, since civil fines have proven to be an ineffective deterrence, enforcement agencies should increasingly rely on criminal sanctions to enforce antitrust laws. Numerous studies have shown that jail sentences effectively deter white-collar crime in particular.<sup>140</sup> The prospect of being incarcerated combined with the potential lost income incurred by an employee responsible for an antitrust violation is as reasonably close as we can get to optimal total deterrence.

Therefore, for the reasons stated above, this article recommends stricter sanctions for individuals found guilty of committing antitrust

---

<sup>136</sup> Ibid.

<sup>137</sup> Using a risk/reward analysis an employee is less likely to commit antitrust violations when they would be personal cost of a potential violation would be more than the employee would personally stand to gain from a corporation’s stock price becoming more valuable.

<sup>138</sup> Sokol, above n 7, 17.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid, citing UK Office of Fair Trading, ‘The Deterrent Effect of Competition Enforcement by the OFT’ (Survey, November 2007) <[http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.offt.gov.uk/shared\\_offt/reports/Evaluating-OFTs-work/oft962.pdf](http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/oft962.pdf)> 71–72; see also Tefft W Smith, ‘Hearing on Criminal Antitrust Remedies’ (Commentary, The Antitrust Modernization Commission, 3 November 2005), <[http://govinfo.library.unt.edu/amc/commission\\_hearings/pdf/Smith\\_Statement.pdf](http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Smith_Statement.pdf)>.

violations. Specifically, the maximum individual fine should be increased from US \$1 million to US \$3 million, and the maximum jail sentence should be increased to a range of five to ten years, to achieve optimal deterrence.

Total reliance on individual criminal sanctions is not without its own challenges – for example, it may be more difficult for prosecutors to meet the ‘beyond a reasonable doubt’ standard required for criminal prosecution. However, the DOJ’s own studies have shown that the Department has been able to prosecute more and more individuals since the passage of the ACPERA and the corporate leniency program.<sup>141</sup> Furthermore, individuals would likely be more tempted to seek the protection of the corporate leniency program if they themselves would be personally responsible for the antitrust violations they commit on behalf of the corporation they work for, thus ensuring individual accountability and increased reliance on the DOJ’s corporate leniency program.

*B The ‘satisfactory cooperation’ requirement of the DOJ’s leniency program*

The passage of the ACPERA has led some to believe we are in a ‘golden age of effective antitrust enforcement’.<sup>142</sup> The ACPERA has significantly increased civil and criminal sanctions,<sup>143</sup> as well as expanded the DOJ’s leniency program that has become the principal focus of the DOJ’s antitrust violation detection efforts.<sup>144</sup> However, the statute itself, and the lack of case law development regarding the ACPERA, has created opposing views on ‘satisfactory cooperation’.<sup>145</sup>

---

<sup>141</sup> Hammond, above n 9.

<sup>142</sup> Ibid 203.

<sup>143</sup> Ibid 13.

<sup>144</sup> Sokol, above n 7, 204.

<sup>145</sup> Criminal Cartel Enforcement, *GAO-11-619: Stakeholder Views on Impact of 2004 Antitrust Reform Act, but Support Whistleblower Protection* 1, 15 (2011) 33–4.

Using the leniency program strategically, leniency applicants have avoided litigation by negotiating their own terms of ‘satisfactory cooperation’.<sup>146</sup> To prevent the abuse and manipulation of the DOJ’s leniency program, parties negotiating terms should require a ‘best efforts to provide full disclosure’ standard to determine if a leniency applicant has provided ‘satisfactory cooperation’ to plaintiffs in civil and criminal cases. This would not only clear up the ‘sufficiency’ ambiguity that amnesty applicants have struggled with since the leniency program was expanded in 2004, but also ensure applicants are actively working to achieve full disclosure of relevant information when they are applying for amnesty under the DOJ’s leniency program.

## V CONCLUSION

While great progress has been made detecting and punishing antitrust violations, recent data suggest that the work is far from over. First, enforcement agencies seeking to effectively deter antitrust violations must rely on criminal penalties as a standard practice to deter antitrust violations. By shifting the focus on deterrence away from corporations and towards the individuals responsible for committing antitrust violations, optimal deterrence will more likely be achieved. Second, applicants seeking amnesty under the DOJ’s leniency program should only be afforded protection from prosecution when it has used its ‘best efforts to provide full disclosure’ as a standard for the ‘satisfactory cooperation’ requirements.<sup>147</sup>

---

<sup>146</sup> Ibid 4 discussing *In re Mun Derivatives Antitrust Litigation*, 252 FRD 184 (SDNY 2008) where an amnesty applicant entered into a cooperating agreement with plaintiffs.

<sup>147</sup> Criminal Cartel Enforcement, *GAO-11-619: Stakeholder Views on Impact of 2004 Antitrust Reform Act, but Support Whistleblower Protection 1*, 15 (2011) 33–4.

# DEFINING THE INTERFACE OF FREEDOM AND DISCRIMINATION: EXERCISING RELIGION, DEMOCRACY AND SAME-SEX MARRIAGE

ALEX DEAGON\*

## Abstract

*Free Exercise of Religion – Priority for Democracy – Freedom – Discrimination – Same-Sex Marriage*

*A number of recent cases in Australia have highlighted an emerging tension between religious freedom and anti-discrimination law, particularly in relation to sexual orientation and same-sex marriage. Opponents of same-sex marriage assert that if same-sex marriage is legalised, anti-discrimination law could be used to restrict religious exercise which conflicts with same-sex marriage. Any constitutional protection of religious exercise is questionable due to the historically narrow construction of the free exercise clause by the High Court. Consequently, this article defines the boundaries of the free exercise clause in this dynamic context, arguing that the High Court should adopt a broader interpretation of free exercise informed by the same priority for democracy reasoning which undergirds the implied freedom of political communication. Contextually appropriate and clear boundaries for the free exercise clause are required for law to effectively engage with this continuing tension between religious freedom and anti-discrimination in a same-sex marriage context.*

## I AUSTRALIA IN THE CRUCIBLE: RELIGIOUS FREEDOM VERSUS ANTI-DISCRIMINATION

The starting point for this article is the fundamental legal tension in Australia between free exercise of religion and anti-discrimination law, and in particular laws dealing with sexual orientation. For example, in *Christian Youth Camps Limited v Cobaw Community Health Services Limited*,<sup>1</sup> Cobaw, an organisation providing suicide

---

\* Lecturer, Faculty of Law, Queensland University of Technology.

awareness and prevention support to young people experiencing same-sex attraction, sought to make a booking for a campsite that was generally available to community groups. Christian Youth Camps ('CYC'), a camping organisation connected to the Christian Brethren, refused to make the campsite available on the basis that it did not want to participate in the advocacy of homosexual activity. Dismissing an appeal, the Victorian Supreme Court found that CYC had discriminated against Cobaw because of sexual orientation.

Conversely, in *Bunning v Centacare*,<sup>2</sup> an employee of a Catholic family counselling centre was dismissed because of her involvement in polyamorous activities. She claimed discrimination on the basis of sexual orientation, but the Federal Court decided that polyamory is a behaviour rather than an orientation, so there was no discrimination. Recently, Tasmania's Archbishop of the Catholic Church released a statement affirming traditional marriage. Transgender activist and Federal Greens candidate, Martine Delaney, impugned this document on the basis that it breached Tasmania's anti-discrimination law by insulting, offending or humiliating an individual or group because of a listed attribute (homosexuality), and brought a case to the Tasmanian Anti-Discrimination Commission. Though the case was eventually dropped, Delaney argued that 'some freedoms are not absolute', and 'in a secular society religious freedom must sometimes give way to the law'.<sup>3</sup>

It is likely that these sorts of cases will continue to increase in frequency and complexity, particularly if same-sex marriage is legalised. Opponents of same-sex marriage argue it will undermine free exercise of religion by combining with anti-discrimination legislation to restrict free exercise and expression of religious perspectives and practices which may conflict with same-sex

---

<sup>1</sup> [2014] VSCA 75.

<sup>2</sup> [2015] FCCA 280.

<sup>3</sup> ABC News, *Anti-discrimination complaint 'an attempt to silence' the Church over same-sex marriage, Hobart Archbishop says* (28 September 2015) Australian Broadcasting Corporation <<http://www.abc.net.au/news/2015-09-28/anti-discrimination-complaint-an-attempt-to-silence-the-church/6810276>>.

marriage. They claim such legislation may be used to ‘enforce a new dimension of political correctness’, instituting a ‘new right’ which would ‘trump previously held rights’ such as the right of religious ministers and institutions to be able to refuse to solemnise a same-sex marriage on the ground of their religious beliefs.<sup>4</sup>

Though proponents of same-sex marriage have responded by saying that exemptions will be passed to cover these circumstances, the fear is that either the promise for such exemptions is disingenuous, or that in practice the exemptions will not effectively operate to protect religious people, ministers or organisations from claims of discrimination.<sup>5</sup> This fear has been exacerbated by major political parties indicating that they may reduce or remove the anti-discrimination exemptions which already exist for religious organisations if they are elected, or the Shadow Attorney-General indicating that he does not believe there is any relation between same-sex marriage and encroachment on religious freedom.<sup>6</sup> Moreover, any protection given by s 116 of the Constitution, which contains a clause prohibiting laws which restrict the free exercise of religion, is questionable due to its very narrow construction by the High Court.<sup>7</sup>

The clause which prohibits laws restricting the free exercise of religion applies solely to Commonwealth laws and has only been tested three times, with the High Court yet to find a violation.<sup>8</sup> This

---

<sup>4</sup> Neville Rochow, ‘Speak Now or Forever Hold Your Peace – The Influence of Constitutional Argument on Same-Sex Marriage Legislation Debates in Australia’ (2013) 3 *Brigham Young University Law Review* 521, 526–7.

<sup>5</sup> *Ibid* 526.

<sup>6</sup> See generally The Australian Greens, *Caring About the Rule of Law: Protecting Human Rights* (25 July 2015) The Australian Greens <[http://greensmps.org.au/sites/default/files/130725\\_greens\\_rol.pdf](http://greensmps.org.au/sites/default/files/130725_greens_rol.pdf)>; see also *Could a Deal on the Gay Marriage Plebiscite be on the Cards?* (24 September 2016) News <<http://www.news.com.au/lifestyle/gay-marriage/could-a-deal-on-the-gay-marriage-plebiscite-be-on-the-cards/news-story/e09eafc5fbd2c4b729b347743976162f>>.

<sup>7</sup> *Kruger v Commonwealth* (1997) 190 CLR 1; Rochow, above n 4, 528.

<sup>8</sup> See most recently *Kruger v Commonwealth* (1997) 190 CLR 1, 40 (Brennan CJ), 161 (Gummow J) where laws forcibly removing

dearth of judicial activity concerning the free exercise clause, and lack of use where it is relevant, belies its potential and developing importance in the arena of religious freedom and anti-discrimination, where anti-discrimination legislation may effectively operate to curb the free exercise of religion. Consequently, this article will attempt to define the boundaries of the free exercise clause in this dynamic legal context of same-sex marriage and anti-discrimination law relating to orientation and marital status (as a new definition of marriage would presumably influence the interpretation of the marital status provisions). The analysis will focus primarily on Australian law in the Commonwealth jurisdiction.

The central argument of this article is that the free exercise clause should be expanded to protect religious freedom from the general operation of anti-discrimination law in particular circumstances. There are two components to this argument. The first component is the claim that the interpretation of the free exercise clause should be expanded. Within this claim, there are two issues considered. First, one problem with the current law on free exercise is the ‘purpose’ requirement. To be a law invalidly restricting the free exercise of religion, the law must have the restriction or regulation of religion as part of its express purpose.<sup>9</sup> This means that the Commonwealth can potentially restrict the free exercise of religion indirectly through the effect of the law, circumventing and undermining the application of the free exercise clause. In Part II, the article argues that in contrast

---

Indigenous Australians from their culture and heritage did not breach the free exercise clause. For the previous two cases see *Krygger v Williams* (1912) 15 CLR 366 where religiously grounded objections to compulsory military participation were not considered within the scope of free exercise of religion, and *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116 where legislation dissolving the Jehovah’s Witnesses organisation did not breach the free exercise clause. See generally David Bogen, ‘The Religion Clauses and Freedom of Speech in Australia and the United States: Incidental Restrictions and Generally Applicable Laws’ (1998) 46 *Drake Law Review* 53, 57–8. No case has considered the free exercise clause since Bogen’s article.

<sup>9</sup> *Kruger v Commonwealth* (1997) 190 CLR 1, 40 (Brennan CJ), 161 (Gummow J).

to the current majority view which requires that the law restrict free exercise of religion in its terms, the High Court ought to adopt Gaudron J's more expansive view that the free exercise clause operates to prohibit laws which restrict free exercise of religion by their indirect effect, as well as by their direct purpose.<sup>10</sup>

The second issue with the current law on the free exercise clause is the paucity of decisions and the strict method of resolving these decisions. This may be related to a general lack of scholarly consideration of the relationship between the free exercise clause and anti-discrimination legislation.<sup>11</sup> The free exercise clause has been interpreted narrowly, and this could present problems for the protection of religious freedom in the context of anti-discrimination. However, the true nature and extent of any potential problem is not really known because the justification, nature and limits of the free exercise clause are largely unclear and unarticulated in the modern context of tension with anti-discrimination legislation. To address this, the article develops Gaudron J's view in Part III and applies it in Parts V and VI. According to contextual constitutional structure and principled argument, a broad view of free exercise is informed by reasoning similar to that underlying the implied freedom of political communication; namely, that democracy should be prioritised through limiting restrictions (such as anti-discrimination legislation) on the public expression of religious views and practice. This further means that we may borrow from the implied freedom's methodology to articulate the limits of the freedom; this is discussed in Parts VI and VII.

The second component of the central argument is the claim that religious freedom should be protected from the general operation of anti-discrimination law in particular circumstances. The main issue here involves balancing free exercise of religion with anti-

---

<sup>10</sup> Ibid 131–2.

<sup>11</sup> Instead, articles have largely focused on a human rights clash between the right to freely exercise religion and the right to freedom from discrimination: See, eg, Anthony Gray, 'Reconciliation of Freedom of Religion with Anti-Discrimination Rights' (2016) 42(1) *Monash University Law Review* 72.

discrimination and complements the first component of the central argument by contemplating a different kind of expansion to the free exercise clause. The current religious exemptions in Commonwealth anti-discrimination law relating to sexual orientation and marital status, outlined in Part IV, are restricted to religious organisations and do not extend to religious individuals. However, the text of the free exercise clause does not distinguish between free exercise of religion for organisations and free exercise of religion for individuals. It simply states that free exercise of religion should not be prohibited, and an implication is that this applies to both individuals and organisations. Therefore, the article argues in pts V and VI that the discrimination exemptions for religious organisations which already exist should be preserved, and could also be extended to protect religious individuals who engage in religious practice at risk of restriction by anti-discrimination legislation.

Part VI consequently articulates an approach to the boundaries of free exercise informed by these textual and contextual considerations and develops a preliminary test which is more expansive and more appropriate for defining the interface between freedom and discrimination.<sup>12</sup> Finally, Part VII summarises the argument and explains the test, indicating the importance of clear and specific boundaries for the operation of the free exercise clause in preparation for a future where there will most likely be sustained conflict between religious freedom and anti-discrimination.

## II FREE EXERCISE: BROADENING A NARROW APPROACH

The first task of this article is to explain the current High Court doctrine regarding the free exercise clause contained in s 116 and consider the possibility of adopting the broad approach advocated by Gaudron J. Section 116 of the Australian Constitution states that:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test

---

<sup>12</sup> Moens calls for such a test: see Gabriel Moens, 'Action-Belief Dichotomy and Freedom of Religion' (1989) 12 *Sydney Law Review* 195, 215.

shall be required as a qualification for any office or public trust under the Commonwealth.<sup>13</sup>

Evans explains that s 116 has historically been given a very conservative and limited interpretation by the High Court, such that the boundaries of free exercise and issues of discrimination have largely been left to political and democratic processes. Courts have been generous and inclusive in defining religion, but very narrow in defining the scope of religious freedom.<sup>14</sup> Chief Justice Latham in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* ('*Jehovah's Witnesses*')<sup>15</sup> argued that since the 'free exercise' of religion is protected, this includes but extends beyond religious belief or the mere holding of religious opinion; the protection 'from the operation of any Commonwealth laws' covers 'acts which are done in the exercise of religion' or 'acts done in pursuance of religious

---

<sup>13</sup> For an overview and consideration of the legal and historical context of s 116, see generally Anthony Blackshield, 'Religion and Australian Constitutional Law' in P Radan et al (eds), *Law and Religion* (Routledge, 2005). For an overview of the legal state of the free exercise clause see Gabriel Moens et al, *The Constitution of the Commonwealth of Australia Annotated* (LexisNexis, 8<sup>th</sup> ed, 2011) 799–804.

<sup>14</sup> See in particular *Krygger v Williams* (1912) 15 CLR 366, 369 (Griffith CJ); *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 149–50 (Rich J); *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 135–36 (Mason ACJ and Brennan J). See also Carolyn Evans, 'Religion as Politics not law: The Religion Clauses in the Australian Constitution' (2008) 36(3) *Religion, State and Society* 283, 284. Mortenson also observes the very narrow interpretation given to the free exercise clause, though he acknowledges that questions over the applicability of s 116 to the Territories and the fact that it only applies to Commonwealth legislation have also contributed to its restricted operation; see Reid Mortenson, 'The Unfinished Experiment: A Report on Religious Freedom in Australia' (2007) 21 *Emory International Law Review* 167, 170–1.

<sup>15</sup> *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116.

belief as part of religion'.<sup>16</sup> However, subsequent cases noted these acts must be religious conduct, or 'conduct in which a person engages in giving effect to his [sic] faith in the supernatural'.<sup>17</sup> Religious conduct protected by s 116 extends to 'faith and worship, to the teaching and propagation of religion, and to the practices and observances of religion'.<sup>18</sup> This is a narrow definition which restricts 'free exercise' to that conduct which is overtly religious and normally considered private in nature, such as prayer and church attendance.

Furthermore, not every interference with religion is a breach of s 116, but only those which 'unduly infringe' upon religious freedom.<sup>19</sup> At a minimum, the High Court has stated that the narrowest limitations on free exercise of religion are appropriate – that required for the 'maintenance of civil government' or 'the continued existence of the community'.<sup>20</sup>

The framers were conscious of this in their drafting process, acknowledging that the free exercise clause should not extend to protect those beliefs which include particular religious rites involving murder and human sacrifice.<sup>21</sup> So at one end of the spectrum free exercise of religion is restricted to overtly religious conduct which

---

<sup>16</sup> Ibid 124–5 (Latham CJ). This follows Griffith CJ in *Krygger v Williams* (1912) 15 CLR 366, 369 (Griffith CJ), indicating that s 116 not only protects religious belief/opinion or the private holding of faith, but also protects 'the practice of religion – the doing of acts which are done in the practice of religion'. For further discussion and questions regarding the current applicability of this 'action-belief dichotomy', see Gabriel Moens, 'Action-Belief Dichotomy and Freedom of Religion' (1989) 12 *Sydney Law Review* 195.

<sup>17</sup> *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136 (Mason ACJ and Brennan J).

<sup>18</sup> Ibid 135–36 (Mason ACJ and Brennan J).

<sup>19</sup> Evans, above n 14, 297; see generally *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116.

<sup>20</sup> Mortenson, above n 14, 173; *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 126, 131 (Latham CJ), 155 (Starke J).

<sup>21</sup> *1898 Australasian Federation Conference Third Session Debates*, Melbourne, 7 February 1898, 656 (Right Hon Sir E N C Braddon).

gives effect to a religious belief (e.g., prayer and worship), and at the other end of the spectrum, religious conduct which is incompatible with a civil government (e.g., murder and human sacrifice) is clearly not protected. However, there is limited jurisprudence on conduct which falls somewhere in the middle, such as public conduct influenced or affected by religious conscience – the running of a business, or a school. It is precisely this area which is affected by anti-discrimination legislation, and it is problematic that there is no exact statement explaining how the free exercise clause may protect this conduct.

In this sense, Chief Justice Latham was surely right when he observed that when defining a ‘free’ exercise of religion, ‘the word “free” is vague and ambiguous’ and must take its meaning ‘from the context’ – there is no universally applicable definition.<sup>22</sup> However, the decisions of the High Court in free exercise cases suggest that the Court nevertheless takes a very restrictive approach. For example, the last time the High Court considered the free exercise clause was the 1997 case of *Kruger v Commonwealth* (‘*Kruger*’).<sup>23</sup> In *Kruger*, the plaintiffs argued that a Northern Territory ordinance which authorised the forced removal of Indigenous children from their tribal culture and heritage was invalid as a law prohibiting the free exercise of religion. Leaving aside the Court’s discussion of whether s 116 applies in the territories, the majority held that the impugned law did not mention the term ‘religion’ and was not ‘for’ the purpose of prohibiting the free exercise of religion in its terms, and so the law was upheld. Only laws could breach s 116, not the administration of laws.<sup>24</sup> Chief Justice Brennan, Gummow and McHugh JJ (in separate majority judgments) reinforced the traditional narrow approach, stating that to be invalid under s 116 the impugned law ‘must have the purpose of achieving an object which s 116 forbids’, and

---

<sup>22</sup> *Adelaide Company of Jehovah’s Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 126–7 (Latham CJ).

<sup>23</sup> (1997) 190 CLR 1.

<sup>24</sup> Carolyn Evans, ‘Religion as Politics not law: The Religion Clauses in the Australian Constitution’ (2008) 36(3) *Religion, State and Society* 283, 296.

upholding the law on the basis that ‘no conduct of a religious nature was proscribed or sought to be regulated in any way’.<sup>25</sup>

Thus the current High Court approach is narrow and focused on the explicit purpose of the legislation: if the impugned law does not restrict free exercise of religion as part of its purpose, it will be valid.<sup>26</sup> In *Church of the New Faith*, Mason ACJ and Brennan J even go so far as to say that ‘general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them’.<sup>27</sup> So the current High Court position is that generally applicable laws for the maintenance of society cannot be prohibited by the free exercise clause unless the laws have the specific objective of restricting the free exercise of religion. This position has important implications for the relationship between the free exercise clause and anti-discrimination legislation. Anti-discrimination laws with the general (and commendable) objective of promoting equality in society will not breach the free exercise clause, because they are not directed towards the regulation of religion. Consequently, there may well be situations where there are significant restraints placed on religious freedom without a breach of s 116 being found.<sup>28</sup>

As discussed in Part IV, there are some exemptions for religious organisations, but this article argues that generally applicable laws (such as anti-discrimination legislation) which incidentally restrict free exercise should contain exemptions allowing free exercise of

---

<sup>25</sup> *Kruger v the Commonwealth* (1997) 190 CLR 1, 40, 161 (Gummow J).

<sup>26</sup> The result is foreseen by Moens: see Gabriel Moens, ‘Church and state relations in Australia and the United States: The purpose and effect approaches and the neutrality principle’ (1996) 4 *Brigham Young University Law Review*, 788–89, 809–10.

<sup>27</sup> Evans, above n 14, 297; *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136 (Mason ACJ and Brennan J).

<sup>28</sup> For example, in *Adelaide Company of Jehovah’s Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 132–33 (Latham CJ), the Court held that the regulations purporting to dissolve the organisation did not infringe s 116. Cf S McLeish, ‘Making Sense of Religion and the Constitution: A Fresh Start for Section 116’ (1992) 18 *Monash University Law Review* 207, 208–9.

religion for individuals as well as organisations. Otherwise, the Commonwealth could seek to do indirectly what they cannot do directly: restrict the free exercise of religion. In addition, as will be argued in Part V, this possibility of indirect restriction indicates the need for a broader approach which considers effect as well as purpose, exemplified by Gaudron J's dissenting judgment in *Kruger*.<sup>29</sup>

Justice Gaudron argues:

There are two matters, one textual, the other contextual, which... tell against construing s 116 as applying only to laws which, in terms, ban religious practices or otherwise prohibit the free exercise of religion... the need to construe guarantees so that they are not circumvented by allowing to be done indirectly what cannot be done directly has the consequence that s 116 extends to provisions which authorise acts which prevent the free exercise of religion, not merely provisions which operate of their own force to prevent that exercise.<sup>30</sup>

Justice Gaudron disagreed with the explicit purpose requirement for textual and contextual reasons, arguing that it was an inappropriate approach to construing constitutional limits on Commonwealth legislative power as it could allow the Commonwealth to do indirectly what they could not do directly. She consequently held that s 116 extends to protect laws which operate to restrict free exercise of religion in their effect, not just those which explicitly ban it. The textual reason Gaudron J gives is that the clause explicitly states that it applies to laws which restrict the free exercise of religion, whether

---

<sup>29</sup> This approach is not without precedent before *Kruger*. In *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116 the Court mentioned that the purpose of the legislation may properly be taken into account, but a regulation which is neutral on its face yet burdens the free exercise of religion in its effect could offend the free exercise clause. See *Mortenson*, above n 14, 172–3; *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 136 (Latham CJ).

<sup>30</sup> *Kruger v the Commonwealth* (1997) 190 CLR 1, 131–2 (Gaudron J).

this is direct or indirect. If free exercise is in fact restricted by the operation of a Commonwealth law, then the clause should apply.

Gaudron J argued that in any case, the Commonwealth has no power to make laws for the explicit purpose of prohibiting the free exercise of religion. This means that if the free exercise clause were only to effectively apply to laws which prohibit the free exercise clause in their terms, it would render the clause superfluous. Therefore, the free exercise clause must operate at a broader level than prohibiting laws which restrict free exercise as a matter of purpose; it must extend to also prohibiting laws which restrict free exercise in their indirect effect.<sup>31</sup> Justice Gaudron's interpretation is plausible, taking into account the text of the free exercise clause and demonstrating that the interpretation of the majority would render the free exercise clause superfluous. Since the clause should be understood as expressed and not read down to be merely cosmetic, it follows that Gaudron J's approach may be the better approach.

Expanding on Gaudron J's approach in the dynamic context of same-sex marriage and anti-discrimination provisions, the remainder of this article develops related textual and contextual arguments for broadening the current understanding of prohibiting free exercise. The term 'textual' refers to the actual text and literal construction of the free exercise clause. The term 'contextual' refers to the general structure of the Constitution and the concerns which underpin interpretation of the structure and specific provisions. In particular, the contextual consideration of the implied freedom of political communication suggests an approach which prioritises democracy, allowing free exercise in the form of publicly expressing controversial religious views about same-sex marriage which may inform voting, and public religious practice as a form of civic participation. This contextual consideration implies that the current exemptions for religious organisations should be retained. Furthermore, the textual consideration that the free exercise clause makes no distinction between the free exercise of religion by religious organisations and free exercise of religion by religious individuals

---

<sup>31</sup> Evans, above n 14, 296; *Kruger v the Commonwealth* (1997) 190 CLR 1, 131–2 (Gaudron J).

also implies that religious individuals should be granted the same anti-discrimination exemptions afforded to religious organisations in order to foster a robust and pluralistic democracy.

### III A CONTEXTUAL CONSIDERATION: IMPLIED FREEDOM OF POLITICAL COMMUNICATION

#### *A Priority for Democracy*

It is generally accepted that free exercise of religion and the implied freedom of political communication intersect to protect the public expression of religious speech which may affect voting.<sup>32</sup> This part of the article extends that contention to argue that the same concerns which underpin the implied freedom of political communication apply to the free exercise clause. It follows that there should be a broader approach to free exercise in order to facilitate representative democracy. Essentially, the article will present a normative argument, supported by High Court doctrine on the implied freedom, that

---

<sup>32</sup> For background to the implied freedom, see *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. For analyses of the judgments, see Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1994) 18 *University of Queensland Law Journal* 249, 249–51; Arthur Glass, 'Freedom of Speech and the Constitution: *Australian Capital Television* and the Application of Constitutional Rights' (1995) 17 *Sydney Law Review* 29, 32–5; Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23 *Federal Law Review* 37, 38–41. For reasoning consistent with an intersection between the implied freedom and the free exercise of religion, see, eg, *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 125–26 (Latham CJ) where Latham CJ mentions the effect of faith on politics; Cf *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 138–39 (Mason CJ); Nicholas Aroney, 'The Constitutional (In) Validity of Religious Vilification Laws: Implications for their Interpretation' (2006) 34 *Federal Law Review* 287, 303; D Meagher, 'What is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28 *Melbourne University Law Review* 438.

interpretation of the Constitution is grounded in a ‘priority for democracy’, and this priority is why the broader interpretation of the free exercise clause should be adopted.<sup>33</sup> Priority for democracy means all religious, philosophical and scientific voices (like votes) should be considered equally when it comes to decision-making.<sup>34</sup> As Bader contends:

Instead of trying to limit the content of discourse by keeping all contested comprehensive doctrines and truth-claims out, one has to develop the duties of civility, such as the duty to explain positions in publicly understandable language, the willingness to listen to others, fair-mindedness, and readiness to accept reasonable accommodations or alterations in one’s own view.<sup>35</sup>

This is not the same as a ‘public reason’ requirement of the type advocated by, for example, John Rawls, who prescribes certain minimum standards of equal citizenship by effectively preventing the public discussion of contested comprehensive doctrines, both religious and secular.<sup>36</sup> The focus is on creating a public space for free and fair discussion of contested views which are equally considered in the decision-making process. Allowing the opportunity for all views to be robustly proposed and debated in a civil manner is a primary feature of Australia’s democratic system. One may of course disagree with what is expressed, but the nature of democratic discourse is that all kinds of views should be able to be proposed. It follows that a priority for democracy model should explicitly allow for all religious or non-religious arguments compatible with the democratic process, leading to a pluralistic encounter of perspectives which will combine and contribute to policy-making and allow true liberal democracy – the freedom to equally express and decide

---

<sup>33</sup> V Bader, ‘Religious Pluralism: Secularism or Priority for Democracy?’ (1999) 27 *Political Theory* 597, 612–13.

<sup>34</sup> Ibid 612–3. Cf, for example, Jeremy Waldron, *Law and Disagreement* (Oxford, 1999).

<sup>35</sup> Bader, above n 33, 614.

<sup>36</sup> See, eg, John Rawls, *Political Liberalism: Expanded Edition* (Columbia, 4<sup>th</sup> ed, 2011) 75.

between a full array of perspectives, with the state promoting and excluding none.<sup>37</sup>

What is required is a sensible balancing of the different claims, taking into account minority religions, majority religions, and those who follow no religion.<sup>38</sup> Indeed, as their justification for implying the freedom of political communication, the judges in the leading cases rely on this idea of prioritising democracy, or the ‘principle that free speech will facilitate the discovery of truth and the influencing of values and will thus assist the voters to make a meaningful choice’.<sup>39</sup> Free communication provides a broad scope of opinions on an even broader range of topics, all of which enable voters to discover the truth and implement their associated values in the political context: electing members of particular parties advocating particular policies.

Deane and Toohey JJ argued as part of the majority in *Nationwide News Pty Ltd v Wills*<sup>40</sup> (‘*Nationwide News*’) that the doctrine of representative government (government by representatives elected by and responsible to the Australian people) implicitly undergirds the Constitution.<sup>41</sup> The justices contended that voters would be unable to discharge their constitutional obligation to choose their representatives if they were unable to communicate with each other about the background, qualifications and policies of the candidates and the ‘countless number’ of other factors which are relevant to consideration of the interests of the nation and the people.<sup>42</sup> Consequently, Deane and Toohey JJ concluded that in the doctrine of representative government incorporated in the Constitution there exists an implication of free communication of information relating

---

<sup>37</sup> Bader, above n 33, 617.

<sup>38</sup> Ibid 608.

<sup>39</sup> Kirk, above n 32, 52. See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138–40 (Mason CJ), 211–12 (Gaudron J), 230–32 (McHugh J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 47–50 (Brennan J), 72 (Deane and Toohey JJ).  
<sup>40</sup> (1992) 177 CLR 1.

<sup>41</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70 (Deane and Toohey JJ).

<sup>42</sup> Ibid 72 (Deane and Toohey JJ).

to the government of the Commonwealth.<sup>43</sup> Since the Constitution operates based on a system of representative government and representative government requires free communication to properly function, it follows that the Constitution implies a guarantee of free political communication so that responsible government can successfully occur.<sup>44</sup>

Chief Justice Mason, as the majority in *Australian Capital Television Pty Ltd v Commonwealth*<sup>45</sup> ('*Australian Capital Television*'), accepted the plaintiffs' argument that since the Constitution assumes and effectively prescribes the doctrine of representative government, free political communication is necessarily implied by the Constitution as an essential corollary of that system.<sup>46</sup> It is only by exercising this freedom that citizens can communicate their views 'on the wide range of matters that may call for, or are relevant to, political action or decision', and 'criticise government actions' and 'call for change', in this way influencing the policies and decisions of the elected representatives.<sup>47</sup> For Mason CJ, the scope of communication covered and the freedom of various communicators is necessarily broad, and 'in a representative democracy public participation in political discussion is a central element of the political process'.<sup>48</sup> This representative sample of statements by the High Court indicates that the functioning of a representative democracy is a primary consideration in the development of the implied freedom. There must be a space for people to freely communicate politically relevant views, and this may entail disagreement, offence and irrationality. However, these are necessary elements of a functioning democracy and are consistent with the Constitutional framework.<sup>49</sup>

---

<sup>43</sup> Ibid 72–73 (Deane and Toohey JJ).

<sup>44</sup> Aroney, above n 32, 249.

<sup>45</sup> (1992) 177 CLR 106.

<sup>46</sup> Ibid 136 (Mason CJ).

<sup>47</sup> Ibid 138 (Mason CJ).

<sup>48</sup> Ibid 139, 142 (Mason CJ).

<sup>49</sup> Glass, above n 31, 32; *Levy v State of Victoria* (1997) 189 CLR 579, 622–3 (McHugh J); *Roberts v Bass* (2002) 212 CLR 1, 44 [110] (Gaudron, McHugh and Gummow JJ).

The fundamental point is that since communication on any subject matter may influence voting on that subject matter, and every subject matter is potentially able to become involved in political processes, communication on any subject may be considered political and therefore covered by the implied freedom.<sup>50</sup> Ultimately, it is the substance of these communications which enables a voter to assess a government. For example, ‘people may form their political opinions by discussion of matters not on the political agenda, including matters like religion and philosophy that develop more fundamental commitments’.<sup>51</sup> Just as the free exercise clause in s 116 protects religiously motivated speech, so the implied freedom of political communication protects political speech. Since voters’ political predilections may be fundamentally influenced by their religious convictions and the expression of religious perspectives, it follows that the implied freedom of political communication operates to protect religious speech.

Aroney also reasons that just as commercial and entertainment speech may possess a relevantly political dimension attracting the constitutional protection, so may religious speech.<sup>52</sup> He contends that ‘the free exercise clause in s 116 undoubtedly protects at least some (if not most) forms of religiously motivated speech, and may also protect communication about religion even if such speech is not religiously motivated’.<sup>53</sup> This is the place where priority for democracy, which consistently undergirds the free exercise of religion and the implied freedom of political communication, becomes relevant. Insofar as religious exercise in s 116 consists of the public expression of religious views and conduct, it is a freedom which is similarly essential to representative democracy and therefore ought to be similarly protected from generally applicable laws. People may have regard to all manner of intellectual disciplines and resources in their political formation and public participation,

---

<sup>50</sup> Kirk, above n 32, 53.

<sup>51</sup> Adrienne Stone, ‘Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication’ (2001) 25 *Melbourne University Law Review* 374, 389–90.

<sup>52</sup> Aroney, above n 32, 297.

<sup>53</sup> *Ibid* 303.

including religion, and the freedom of political communication enables the free dispensation of this information as contributing to representative democracy. In the same way, priority for democracy provides the basis for arguing that Australia's constitutionally mandated system of representative government means that a broader view of free exercise which allows for full and free public participation should be adopted.

### B *The constitutional framework*

There are indications that this type of priority for democracy model was assumed by the framers of the Constitution in relation to s 116. The emphasis in the pre-federation constitutional debates surrounding s 116 was on the protection of the free exercise of religion from impedance by the state, juxtaposed with the community expectation that the state would not privilege one religion over another.<sup>54</sup> For example, both Higgins and Barton were careful to emphasise that the mention of God in the preamble on one hand did not mean that people's rights with respect to religion would be interfered with on the other, and that there would be 'no infraction of religious liberty' by the Commonwealth.<sup>55</sup>

For the framers, rather than a strict insistence on the state as a secular entity which excluded public religion, what was important was the state avoiding the promotion of religion which would cause sectarian division in the community.<sup>56</sup> It was actually felt that the community as a whole should have a religious character, but this religious character would be hindered by explicit state involvement.<sup>57</sup> There should be a state impartiality towards religion, reflected both in the avoidance of religious preference and the protection of individual and group autonomy in matters of religion as participants in the wider

---

<sup>54</sup> McLeish, above n 28, 219.

<sup>55</sup> *1898 Australasian Federation Conference Third Session Debates*, Melbourne, 17 March 1898, 2474 (H B Higgins and Hon Edmund Barton).

<sup>56</sup> McLeish, above n 28, 221–2.

<sup>57</sup> *Ibid* 222.

community.<sup>58</sup> Religious identities are not treated impartially by declaring that religious conduct is a private matter or by excluding religious arguments from political and constitutional debates.<sup>59</sup> For example, for Mortenson it seems inconsistent with prioritising democracy that those who adhere to a secular worldview may be able to publicly express themselves in policy debate in terms of their secularism, but those who adhere to a religious worldview may not be able to so express themselves in terms of their religion.<sup>60</sup>

After all, there are many extra-political factors which influence public policy, such as economics, morality and culture. Any denial of religious discourse without addressing other external influences would seem to constitute hostility toward religion specifically, undermining its free exercise.<sup>61</sup> True ‘impartiality’ toward religion, therefore, includes the state not acting to impede the autonomy of individuals or groups making and pursuing religious choices. There are certainly valid limits to expressive conduct and unnecessarily offensive material, as well as restrictions on insolent modes of expression. However, to effectively equate disagreement with incommensurability or offense worthy of restriction is a grave mistake, particularly in a robust democracy where disagreement on all manner of deeply held incommensurable beliefs and conduct (not limited to religion) is ubiquitous.

These notions are reflected in the intention of at least one framer. Symon states that through s 116, the framers are ‘giving... assertion... to the principle that religion or no religion is not to be a bar in any way to the full rights of citizenship, and that everybody is to be free to profess and hold any faith he [sic] likes’.<sup>62</sup> To profess a

---

<sup>58</sup> Ibid 223.

<sup>59</sup> See Nicholas Wolterstorff, ‘Why we would reject what liberalism tells us etc.?’ in P Weithman (ed), *Religion and Contemporary Liberalism* (Notre Dame, 1997) 162–81.

<sup>60</sup> Reid Mortenson, ‘The Establishment Clause: A Search for Meaning’ (2014) 33(1) *University of Queensland Law Journal* 109, 124–5.

<sup>61</sup> McLeish, above n 28, 228.

<sup>62</sup> *1898 Australasian Federation Conference Third Session Debates*, Melbourne, 8 February 1898, 660 (J H Symon).

faith presumably includes public expression of that faith in words and conduct; otherwise, the distinction made between holding a faith and professing a faith is superfluous.<sup>63</sup>

Many of the framers did not desire a secular society which rejected the public display and discourse of religion. The historical and cultural context of the development of s 116 was a general endorsement of religion and a climate of tolerance based on a concern for the advancement of religion.<sup>64</sup> Consequently, the purpose undergirding s 116 was 'the preservation of neutrality in the federal government's relations with religion so that full membership of a pluralistic community is not dependent on religious positions'.<sup>65</sup> This is reflected in Symon's statement that 'what we want in these times is to protect every citizen in the absolute and free exercise of his own faith, to take care that his religious belief shall in no way be interfered with'.<sup>66</sup>

Thus, a narrow view of the free exercise clause as only preventing laws which directly restrict free exercise seems to be inconsistent with prioritising an authentically democratic culture encouraging full public and political engagement. If indirect restriction of free exercise is allowed through generally applicable laws, as it currently is, the result is religious individuals and organisations will be unduly burdened in their religious practice (as occurred for Indigenous Australians in *Kruger* and the Jehovah's Witnesses organisation in that case), and it follows that these religious people or organisations will not be able to fully participate as citizens in a democratic society.<sup>67</sup> Priority for democracy demands an approach to free

---

<sup>63</sup> See Moens, above n 16, 216.

<sup>64</sup> J Puls, 'Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees' (1998) 26 *Federal Law Review* 139, 140.

<sup>65</sup> Ibid 151; Cf generally Gabriel Moens, 'The Menace of Neutrality in Religion' (2004) 5(1) *Brigham Young University Law Review* 525.

<sup>66</sup> *1898 Australasian Federation Conference Third Session Debates*, Melbourne, 8 February 1898, 659 (J H Symon).

<sup>67</sup> See, eg, Valerie Kerruish, 'Responding to *Kruger*: The Constitutionality of Genocide' (1998) 11(1) *Australian Feminist Law Journal* 65, 67–8.

exercise that allows citizens to fully participate in democratic society despite their religious beliefs and practice, just as priority for democracy demands an approach to political communication which allows the public expression of religious perspectives to create a free and informed choice at an election.

### *C Democracy and free exercise*

Even prior to the High Court articulating the implied freedom of political communication, similar principles of prioritising democracy and civic participation informed interpretation of the free exercise clause. For example, speaking of Griffith CJ's construction of s 116 in *Krygger v Williams*,<sup>68</sup> which distinguished between protected beliefs and unprotected public acts consequent on those beliefs, Hogan states that 'such an interpretation, which would make "religion" apply only to the internal forum, with no relevance to public acts, would make s 116 a complete mockery'.<sup>69</sup> This extremely narrow interpretation has been rejected by the High Court.<sup>70</sup> Despite Latham CJ's efforts in *Jehovah's Witnesses* to show that s 116 protects acts done in pursuance of religion as well as the possessing of religious opinion, he also observed that:

Section 116, however, is based upon the principle that religion should, for political purposes, be regarded as irrelevant. It assumes that citizens of all religions can be good citizens, and that accordingly there is no justification in the interests of the community for prohibiting the free exercise of any religion.<sup>71</sup>

---

<sup>68</sup> (1912) 15 CLR 366.

<sup>69</sup> Michael Hogan, 'Separation of Church and State: Section 116 of the Australian Constitution' (1981) 53(2) *The Australian Quarterly* 214, 219–20.

<sup>70</sup> *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 124–25 (Latham CJ). See also the agreement expressed by Clifford Pannam, 'Travelling Section 116 with a US Road Map' (1963) 4 *Melbourne University Law Review* 41, 65–7.

<sup>71</sup> *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 126 (Latham CJ).

This could be read as Latham CJ espousing the separation of religion and politics, but such an interpretation seems incongruent with the rest of his judgment. Chief Justice Latham provided a number of different religious examples illustrating the opposing contention that faith is not completely separate from politics.<sup>72</sup> Rather, Latham CJ can be understood as arguing for a true state impartiality – not the strict separation of religion and politics, but the equal promotion (or at least, the equal lack of prohibition) of the free exercise of any religion.<sup>73</sup> His reasoning is that since all citizens of any religion or non-religion can be good citizens and participate appropriately in the democratic process, there is no basis as a matter of citizenship for restricting the free exercise of religion in general, or the free exercise of any religion in particular. As Mason ACJ and Brennan J state in *Church of the New Faith*, '[f]reedom of religion, the paradigm freedom of conscience, is of the essence of a free society'.<sup>74</sup> Promoting a free society is an essential aspect of prioritising democracy. Thus, freedom of religion is a necessary component of prioritising democracy.

Pannam therefore concludes that 'section 116 guarantees the right to disbelief. It does not allow a non-believer to force his [sic] disbelief on others... His [sic] voice may be raised in the legislature against the merits of governmental assistance, it cannot be heard in the courts to prevent it'.<sup>75</sup> It is through public participation in the democratic process by religions that government actions in relation to religious belief and action can be determined. Importantly, the pieces by Hogan and Pannam were both written before the High Court articulated the implied freedom of political communication and therefore they cannot be taken as explicitly advocating a relationship between the two freedoms. However, they at least anticipate a willingness to accept freedom of religion as extending to external actions based on belief if these actions are compatible with the democratic process.

---

<sup>72</sup> Ibid 125–6 (Latham CJ).

<sup>73</sup> Ibid; Cf Aroney's implicit agreement and clarification of Latham CJ's position in Aroney, above n 32, 301–2.

<sup>74</sup> *Church of the New Faith v Commissioner of Pay-Roll Tax* (1983) 154 CLR 120, 130 (Mason ACJ and Brennan J).

<sup>75</sup> Pannam, above n 70, 86.

More precisely, freedom of religion should extend to protect all external actions which are not dangerous to society or democracy, even if those views or actions are deemed unpopular according to community values.<sup>76</sup> As Latham CJ observes, ‘section 116 is required to protect the religion (or absence of religion) of minorities, and in particular, of unpopular minorities’.<sup>77</sup> This protection of the external expressions or actions of unpopular views is consistent with the implied freedom and indicates that the principle of prioritising democracy which undergirds the implied freedom should also result in a broader approach to free exercise.<sup>78</sup> Since a democracy should allow for the expression of all views compatible with democracy as a matter of freedom and equality (even if they are unpopular), in the same way, a democracy should allow for the public expression of religious perspectives and practice compatible with democracy – particularly given the presence of the free exercise clause.

All this begs the question of how the free exercise clause would mean protection for a wider field of activity than the implied freedom of political communication. Given that the scope of the implied freedom is extremely broad, covering communicative conduct as well as speech, it could be objected that the role of s 116 is merely artificial. According to the assumptions of prioritising democracy, any public expression of religious views or conduct is covered by the implied freedom, excluding any role for the free exercise clause.<sup>79</sup> However, the types of conduct potentially covered by the free exercise clause extend beyond the kinds of conduct covered by the implied freedom. These include indirect restriction of free exercise such as in *Kruger*, the ability of religious organisations to choose employees consistent with their religious doctrine, and the ability of religious individuals to conduct themselves and their businesses consistent with their

---

<sup>76</sup> See *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 149–50 (Rich J).

<sup>77</sup> *Ibid* 124 (Latham CJ).

<sup>78</sup> Cf *Coleman v Power* (2004) 220 CLR 1; *Monis v The Queen* (2013) 249 CLR 92.

<sup>79</sup> *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 43–4 [67] (French CJ); *Levy v State of Victoria* (1997) 189 CLR 579.

religious convictions. Such conduct potentially falls within the scope of free exercise, but is not, at least ostensibly, politically relevant and is therefore outside the scope of the implied freedom. This leaves a unique role for the free exercise clause.

Zimmermann helpfully conceives the relationship between the two freedoms in the sense that an implied freedom of communication on religious grounds exists which is derived from the implied freedom of political communication, and from the same motivation of prioritising democracy.<sup>80</sup> Using the principles undergirding the implied freedom (which have been consistently endorsed by the High Court) to provide the conceptual and contextual framework for interpreting the free exercise clause allows an expanded view of free exercise, facilitating public expression of religious conduct and perspectives for the purpose of prioritising democracy. The reasoning undergirding the implied freedom of political communication is significant when it comes to the tension between religious freedom and anti-discrimination. Based on the argument in this part that unduly restricting free exercise undermines democracy, anti-discrimination legislation which burdens the free religious exercise of individuals and organisations in its effect as well as its purpose could be held invalid as breaching s 116. This fundamental contention is developed in the following parts.

#### IV A TENSE UNION: FREEDOMS AND DISCRIMINATION IN A SAME-SEX MARRIAGE CONTEXT

To reiterate, the free exercise clause is a protection against Commonwealth laws which restrict or prohibit the free exercise of religion.<sup>81</sup> The implied freedom of political communication is a protection against Commonwealth (and State) laws which restrict

---

<sup>80</sup> Augusto Zimmermann, 'The Unconstitutionality of Religious Vilification Laws in Australia: Why Religious Vilification Laws Are Contrary to the Implied Freedom of Political Communication Affirmed in the Australian Constitution' 2013(3) *Brigham Young University Law Review* 457, 493–503.

<sup>81</sup> *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 122–23 (Latham CJ).

political communication.<sup>82</sup> In order to invoke the freedoms, there must be specific Commonwealth legislation impugned as inconsistent with them or seeking to restrict them. Here, the tension or potential inconsistency exists between religious freedom and anti-discrimination laws relating to sexual orientation and marital status in a context where same-sex marriage may be legalised. In this situation, it is possible that the legalisation of same-sex marriage and the operation of corresponding anti-discrimination legislation could result in a restriction of free exercise. This part will outline the relevant Commonwealth law which may be inconsistent with the free exercise clause.

Marriage is currently defined in s 5(1) of the *Marriage Act 1961* (Cth) as ‘the union of a man and a woman to the exclusion of all others, voluntarily entered into for life’. In a context where same-sex marriage is legalised, an amendment might define marriage as ‘the union of two persons to the exclusion of all others, voluntarily entered into for life’. This would effectively allow both different-sex (traditional) and same-sex marriage. The Commonwealth anti-discrimination legislation considered will be the *Sex Discrimination Act 1984* (Cth) (‘the Act’). Section 5A of the Act states that discrimination occurs on the ground of sexual orientation where, in equal circumstances, the aggrieved person is treated less favourably than a person of a different sexual orientation by reason of the aggrieved person’s sexual orientation. Section 6 of the Act provides an equivalent provision for discrimination on the ground of marital or relationship status.

Sections 14 to 27 of the Act provide for instances of discrimination in specific areas. For example, s 14(1) of the Act states ‘it is unlawful for an employer to discriminate against a person on the ground of the person’s... “sexual orientation” or “marital or relationship status”’ in ‘determining who should be offered employment or in the terms and conditions on which employment is offered’, or ‘by dismissing the employee’. Section 22(1) of the Act provides that ‘it is unlawful for a

---

<sup>82</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's... "sexual orientation" or "marital or relationship status" by 'refusing to provide the other person with those goods or services or to make those facilities available to the other person'.

Sections 37 and 38 of the Act provide exemptions for religious bodies and educational institutions established for religious purposes. Section 37(1) states that none of the sections outlined above affect the ordination, appointment, training or selection of members of any religious order, or any other act or practice of a body established for religious purposes which conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Similarly, s 38(1) specifies that nothing in the relevant paragraphs of s 14 renders it unlawful for a person to discriminate on the grounds of sexual orientation or marital status in connection with employment as a member of an education institution conducted in accordance with the doctrines of a particular religion. Alternatively, s 14 does not apply if the discrimination occurs in good faith and is necessary to avoid injury to the religious susceptibilities of adherents of that religion. These anti-discrimination provisions compromise the Commonwealth legislation which will be considered in the analysis of the free exercise clause in the following parts.

In a typical scenario, a minister of religion, as an agent for a religious institution, might refuse to provide a service to a person because of their sexual orientation. Their reason is providing such a service is not in accordance with their religion. Following the legislation just outlined, such a case would be relatively straightforward. The minister would have discriminated in accordance with s 22 (1), but because their action conforms to the doctrine of the religion and falls within the exemption, a claim would not be successful. There is no need to directly invoke the free exercise clause in order to claim that the Commonwealth legislation is invalid. This is an example of the

Commonwealth's attempt to balance religious freedom with anti-discrimination, and the exemption is a generous allowance for the free exercise of religion in this context.

However, these generous exemptions exist specifically for bodies or organisations (educational or other) established for religious purposes. As discussed in the following parts, even these exemptions have been questioned.<sup>83</sup> Furthermore, exemptions do not exist for individuals attempting to freely exercise their religion. It is this kind of situation where the text of the free exercise clause in s 116 and a more expansive interpretation ought to be duly considered. In particular, a textual consideration seems to require that religious institutions, organisations established for religious purposes, and religious individuals should be protected from laws which prohibit the free exercise of their religion in their purpose or their effect.

#### V TEXTUAL AND CONTEXTUAL CONSIDERATIONS: EXPLORING THE BOUNDARIES OF FREE EXERCISE

##### *A Protecting free exercise: The religious organisation*

Evans and Ujvari consider this controversial question of the extent to which religious schools, as examples of religious organisations, should be exempt from non-discrimination laws that would apply to state schools.<sup>84</sup> Their work also raises important broader points about discrimination, religious freedom and generally applicable laws which are worth considering. They agree that what is most relevant is the situation where discrimination occurs on the basis of conflict with religious teachings, such as where a staff member is gay or lesbian, or, hypothetically, in a same-sex marriage.<sup>85</sup> In considering arguments for allowing exemptions from non-discrimination law, Evans and Ujvari discuss religious freedom in the context of international conventions, but interestingly do not raise the free

---

<sup>83</sup> See, eg, Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30 *Adelaide Law Review* 31, 56.

<sup>84</sup> Ibid 33.

<sup>85</sup> Ibid 35.

exercise clause in s 116.<sup>86</sup> It could, perhaps, be accepted that ‘schools generally fall under the jurisdiction of state and territory laws’, and therefore s 116 is inapplicable and not mentioned for that reason.<sup>87</sup> However, as Evans and Ujvari specifically state, the fact that ‘some educational institutions are subject to Commonwealth law’ and ‘Commonwealth statutes prohibit specific forms of discrimination’ means that Commonwealth jurisdiction should be discussed ‘for the sake of completeness’.<sup>88</sup> It is problematic that analysis of s 116 is inexplicably omitted, particularly given what follows.

In noting arguments against allowing exemptions from non-discrimination law, Evans and Ujvari make the point (again without mentioning s 116) that the right to religious freedom is limited.<sup>89</sup> The existence of exemptions indicates an attempt to balance the competing interests of freedom of religion and non-discrimination. Resolution of this tension and the precise point of balance reached will depend upon the ‘assumptions of various proponents about which value should prevail’.<sup>90</sup> With respect, though balancing the value of freedom through a right to free exercise against the value of equality through a right to non-discrimination is certainly a significant consideration, in a Commonwealth context it is also necessary to consider the Constitutional framework provided by the free exercise clause in s 116.

Moreover, articulating the boundaries of free exercise has important implications for weighing the competing values, particularly if the High Court adheres to the kind of broad priority for democracy reasoning which undergirds the implied freedom of political communication. If maintaining the constitutionally prescribed system of representative government (democracy) is paramount, this would seem to contextually imply that a more expansive interpretation of free exercise is appropriate, since this would facilitate equal civic participation of various perspectives.

---

<sup>86</sup> Ibid 36–40.

<sup>87</sup> Ibid 44.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid 40–2.

<sup>90</sup> Ibid 53–4.

More emphatically, as Mortenson contends, the right to free exercise in the Constitution ‘does not suggest a “balance” to be struck between anti-discrimination standards and rights of religious liberty, but a constitutionally required preference for religious liberty’.<sup>91</sup> This view is implicitly supported by a High Court which has expanded its interpretation of constitutional liberties such as the implied freedom of political communication.<sup>92</sup> It appears that Evans and Ujvari are not the only analysts to neglect the influence of s 116 in this context of religious exemptions to non-discrimination provisions. Writing of the discussions that occurred as part of the drafting process for the *Sex Discrimination Act 1984* (Cth), Mortenson mentions that ‘it is... disturbing to find that, when advising the Commonwealth on this very problem, both the Sex Discrimination Commissioner and the Law Reform Commission failed even to mention the possible impact of s 116’.<sup>93</sup>

In the particular instance of educational institutions operating for religious reasons, there is an appropriate balance given that there are generous exemptions for discrimination in accordance with religious doctrine. This provides for free exercise of religion in conjunction with non-discrimination. However, the general failure to take into account the free exercise clause and the corresponding constitutionally required preference for religious liberty suggested by s 116 is a broader problem which will become more exposed as tensions between religious freedom and non-discrimination increase. The indication by certain politicians or political parties that they may reduce or remove these kinds of exemptions, or do not consider that there is any relation between religious freedom and same-sex marriage, is an example of this problem. The problem is also apparent when it comes to the religious freedom of individuals.

### *B Protecting free exercise: The religious individual*

---

<sup>91</sup> Reid Mortenson, ‘Rendering to God and Caesar: Religion in Australian Discrimination Law’ (1995) 18 *University of Queensland Law Journal* 208, 231.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

For example, a religious person may run a small business which normally provides services in accordance with their religious beliefs, and then refuse to provide a requested service to a same-sex couple because it will conflict with their religious beliefs.<sup>94</sup> This would be discrimination under s 22 (1). However, such a person cannot rely on the exemptions under ss 37(1) or 38(1). Though they may have a consistent practice of refusing jobs which would tend to injure their religious susceptibilities in accordance with the teaching of their religion, the business would probably not be viewed as an educational institution or a body established for religious purposes.

There is growing literature on both sides of this vexed question of individual religious conscience in commercial settings as new cases are raised. However, the majority of them are in the United States context and so discussion of this issue is subject to the Supreme Court interpretation of free exercise in the United States Constitution, as well as any relevant United States state legislation on religious freedom, conscience and anti-discrimination.<sup>95</sup> Though this article focuses specifically on the Australian context, there are advocates for special legislative exemptions for religious small business owners, especially given the United States Supreme Court's position that any law contravening the free exercise clause must focus on 'belief', not

---

<sup>94</sup> See, eg, *Lee v Ashers Baking Co Ltd* [2015] NICty 2.

<sup>95</sup> See, eg, Michael Kent Curtis, 'A Unique Religious Exemption from Anti-Discrimination Laws in the case of gays? Putting the Call for Exemptions for Those Who Discriminate against Married or Marrying Gays in Context' cited in Michael Kent Curtis (ed), *The Rule of Law and the Rule of God* (Palgrave Macmillan, 2014); Roger Severino, 'Or for Poorer: How Same-Sex Marriage Threatens Religious Liberty' (2006) 30 *Harvard Journal of Law and Public Policy* 939; Douglas NeJaime, 'Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination' (2012) 100(5) *California Law Review* 1169; Christopher Eisgruber and Lawrence Sagar, 'The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct' (1994) 61(4) *The University of Chicago Law Review* 1245; Steven Jamar, 'Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom' (1996) 40 *New York Law School Law Review* 719.

‘effect on conduct’.<sup>96</sup> Consistent with the Australian situation, generally applicable laws which indirectly restrict free exercise are allowed.

For example, Berg argues that the same features which support the legalisation of same-sex marriage also support religious exemptions for individuals, particularly the common desire for religious individuals and same-sex couples to express their commitments (which are fundamental to their identity) in a public, holistic way. For the same-sex couple it is their love and fidelity to their partner, and for the religious individual it is their love and fidelity to the object of their religion, but in both cases the parties are claiming a right beyond private behaviour which extends to all aspects of their public lives.<sup>97</sup> When religious individuals are prevented from publicly expressing their religion through conduct related to their social and business interactions, and when same-sex couples are prevented from publicly expressing their orientation and relationship, both are being ‘told to keep their identities in the closet. Anyone who takes the claims of same-sex couples seriously must also give substantial weight to the religious objectors’.<sup>98</sup>

Promoting equality and liberty are essential features of prioritising democracy. Though anti-discrimination laws are directed at addressing inequalities such as discrimination against same-sex couples, religious individuals also have a relevant appeal to equality. Generally applicable laws, such as anti-discrimination legislation, ‘fall disproportionately’ or unequally on those whose religious practices conflict with them.<sup>99</sup> Those who do not engage in religious belief or practice are not subject to the same practical restrictions resulting from the laws. The need to allow for religious liberty, as part of a functioning democracy, is precisely why there ought to be exemptions for religious individuals running small businesses or

---

<sup>96</sup> Thomas Berg, ‘What Same-Sex Marriage Claims and Religious Liberty Claims Have in Common’ (2010) 5(2) *Northwestern Journal of Law and Social Policy* 206, 214.

<sup>97</sup> *Ibid* 207–8, 215–6.

<sup>98</sup> *Ibid* 218.

<sup>99</sup> *Ibid* 225.

charitable organisations.<sup>100</sup> Small businesses that provide personal services are often direct embodiments of the owner's identity, and if the owner feels direct responsibility for conduct to which they object on religious grounds, accommodations should be provided. To refuse such exemptions is to imply that religion should not be connected to business, and this imposes a considerable burden on those who wish to integrate their lives and identities.<sup>101</sup>

In the Australian context, such exemptions are not currently available. The religious individual running a business might attempt to invoke the free exercise clause to claim that this Commonwealth legislation restricts their free exercise of religion. However, based on the majority judgment in *Kruger*, the High Court would probably hold that the Act does not have the restriction or regulation of religion as part of its purpose, and therefore the validity of the legislation would be upheld. The fact that general religious exemptions are included in the legislation would also support that finding because free exercise has arguably been catered for. Nevertheless, the legislation has the effect of restricting free exercise by not allowing the religious person to refuse a job which injures their religious susceptibilities. This is one reason why the purpose or effect approach is too narrow. It allows Commonwealth anti-discrimination legislation to indirectly restrict the free exercise of religion for individuals in particular.

Focusing on the text of the free exercise clause is telling. The clause says that the Commonwealth 'shall not make any law...for prohibiting the free exercise of religion'. Critically, there is no mention of a distinction between religious individuals and religious organisations or organisations established for religious purposes. The clause explicitly states that where there is a prohibition of free

---

<sup>100</sup> Ibid 208.

<sup>101</sup> Ibid 227–8. Berg cogently addresses a series of further objections to the view that exemptions should be extended to religious individuals at 228–35. In particular, he considers the claim that religious objectors can simply switch professions, limits on the exemptions for individuals in a commercial environment, and the greater harm suffered by legal sanctions against objectors than that suffered by those refused a service. This author has nothing to add to that analysis.

exercise, the clause should apply to invalidate the law – whether or not the prohibition involves individuals or organisations. It follows from the text that if exemptions are granted to organisations to implement the free exercise of religion, as they currently are, exemptions should also be granted to individuals so that the clause is properly implemented.

It is true that some state anti-discrimination legislation provides exemptions for religious individuals, and s 10 of the *Sex Discrimination Act 1984* (Cth) states that state laws remain applicable.<sup>102</sup> So in effect, one could say that religious individuals are protected to at least this extent. However, since s 116 applies only to Commonwealth laws and not to state laws, such state protection is serendipitous and mutable rather than a principled acknowledgement of religious freedom grounded in a Constitutional provision. Protections for the religious freedom of individuals vary from state to state and can be restricted or removed at any time without the limit of Constitutional protection. State exemptions are therefore an unreliable version of protection for the religious freedom of individuals (or organisations).

Importantly in the Commonwealth constitutional context, an exemption for religious individuals would merely be a protection. It would not give rise to an enforceable individual right or individual cause of action, just as the exemptions for organisations are a protection rather than a right or cause of action, and just as the implied freedom of political communication does not give rise to an enforceable individual right or cause of action.<sup>103</sup> The potential applicability of the implied freedom returns us to the contextual question of justifying proposed exemptions for Commonwealth anti-discrimination legislation to account for the religious freedom of individuals, based in a broader view of free exercise, which is in turn influenced by the priority for democracy reasoning undergirding the implied freedom of political communication. The implied freedom does not seem to be directly applicable to the religious individual

---

<sup>102</sup> See, eg, *Equal Opportunity Act 2010* (Vic) s 84.

<sup>103</sup> This is explained more in pt VI. See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

running a business, since they are not engaging in politically relevant conduct or speech (at least in a way which is intrinsic to the business – though one could potentially imagine a business operating politically through advertising or financially supporting a policy platform), and so it is outside the scope of this situation. The fact that some religious ‘conduct’ is beyond the scope of the implied freedom does not contradict the earlier statement all religious speech could be political, for not all conduct is speech.

However, if it is assumed that the High Court wishes to facilitate robust political engagement to further democracy, as the justification for the implied freedom of political communication indicates, the fact that some religious conduct would not attract the protection of the implied freedom does not mean the principles underlying the freedom (priority for democracy) do not have implications for allowing the free expression of religious individuals in a democracy. In other words, a general constitutional approach for prioritising democracy could provide a framework for expanding (or at least maintaining) religious freedoms in a democracy. The priority for democracy approach endorsed by the High Court involves the interaction of various, conflicting perspectives from the different cultures and traditions which inform the voting process: a pluralist framework.<sup>104</sup> This approach facilitates free and equal political engagement and public displays of conduct which may not be agreed to by all, but can fairly be evaluated by all in the pursuit of democracy. This specifically includes public religious speech and conduct which may come into conflict with anti-discrimination law.

---

<sup>104</sup> See, eg, Tim Soutphommasane, ‘Grounding Multicultural Citizenship: From Minority Rights to Civic Pluralism’ (2006) 26(4) *Journal of Intercultural Studies* 401. This is distinct from something like an egalitarian notion of citizenship, which tends to remove identity markers. See also Harry Brighouse, ‘Egalitarianism and Equal Availability of Political Influence’ (1996) 4(2) *Journal of Political Philosophy* 118. There is a significant literature on citizenship and democracy which, due to scope, cannot be engaged with here. A pluralist priority for democracy framework is assumed because this seems most consistent with the High Court’s understanding of representative democracy in Australia, as argued in pt III.

Mortenson observes:

However, one inherent paradox in *all* discrimination laws is that, although they aim to protect social pluralism, the principles of equality they usually promote also present a threat to the protection of religious pluralism in the political sphere. This occurs when, despite the traditional recognition of rights of religious liberty, the discrimination laws apply to religious groups that deny the moral imperatives of, say, racial, gender or sexual orientation equality. In this respect, Caesar has generally been prepared to render something to God through the complex exemptions granted in the discrimination laws to religious groups and religious educational or health institutions.<sup>105</sup>

Mortenson recognises this tension between free exercise and anti-discrimination in a pluralist context, and acknowledges that the state has been prepared to concede discrimination exemptions to religious organisations and institutions to promote pluralism. However, even Mortenson does not address exemptions applying to individuals freely exercising their religion. The same reasoning allowing exemptions for religious bodies and institutions could also allow similar exemptions for individuals. A democracy is composed of individuals and the plurality is formed by the interaction of conflicting individual perspectives as well as conflicting group perspectives. It would not be compatible with democratic and pluralist principles to curtail the dynamic interaction of individual people and perspectives by not allowing these individuals to freely exercise their religion due to anti-discrimination legislation. However, to remain consistent, exemptions for individuals should be of the type afforded to organisations or institutions.

For example, the religious person could appeal to a provision which states that individuals who refuse to offer goods or services in a situation where to do so would conflict with the doctrine and practice of their religion, or who would have their religious susceptibilities offended were they compelled to offer the good or service in that situation, are not subject to the anti-discrimination provisions unless the refusal directly results in ‘concrete hardship’ for those who seek

---

<sup>105</sup> Mortenson, above n 91, 231.

the service (that is, if there is no equivalent service reasonably available).<sup>106</sup> This more expansive protection of free exercise complements the implied freedom. The implied freedom protects religious communication as a category of political communication contributing to democracy. If religious communication did not contribute to democracy as a general principle, it would hardly attract the protection. Hence, as a matter of context, to expand the free exercise protection to individuals in an anti-discrimination context is more consistent with the general priority for democracy undergirding the implied freedom of political communication. This claim, then, finally brings us to the fundamental consideration: how broadly the free exercise clause in s 116 specifically should be interpreted within this dynamic context of anti-discrimination law, bearing in mind priority for democracy.

#### VI EXPANSIONS AND LIMITS: RELIGIOUS FREEDOM AND EQUALITY IN OUR DEMOCRACY

To recapitulate, Mortenson notes that if the free exercise clause were ‘given a more substantive operation’, this would have an impact on Commonwealth discrimination laws, particularly given the exemptions are often untested and ambiguous.<sup>107</sup> At the very least, s 116 would seem to require discrimination laws to have some sort of religious exemption. In particular, based on United States case law, Mortenson asserts that to ‘honour rights of religious liberty, religious groups are probably entitled to broad exemptions from the operation of sexual orientation discrimination laws’.<sup>108</sup> Though proposed reforms to the Act overlooked the possible constraints in s 116, preferring to focus on international conventions, they did possess generous exemptions of the kind envisaged by s 116.<sup>109</sup> But again, and this is evident in Mortenson’s statement, these exemptions are only for religious organisations or institutions operating for religious purposes. The same protection is not given to individuals.

---

<sup>106</sup> Cf Berg, above n 96, 208.

<sup>107</sup> Mortenson, above n 91, 219.

<sup>108</sup> *Ibid* 228–29.

<sup>109</sup> *Ibid* 225–6.

Perhaps this is because the High Court has characterised s 116 as a limit on Commonwealth power, rather than as an individual right which would give rise to a cause of action.<sup>110</sup> Accepting the presumption that it would be inappropriate to interpret the free exercise so broadly as to characterise it as a right giving rise to a cause of action, it does not follow that the free exercise clause cannot be interpreted as prohibiting Commonwealth action which restricts the free exercise of individuals, as well as religious bodies or organisations established for religious purposes. It could be understood as a limitation on the Commonwealth exercising legislative power against both religious organisations and religious individuals, and even if the High Court has not found any breach of the clause, the Court has historically understood it as applying to individuals as well as organisations.<sup>111</sup> The corollary of this in the anti-discrimination context is that there seems to be no reason why religious individuals should not also receive protection through anti-discrimination exemptions.

On the question of whether a law infringes the free exercise clause, Gaudron J specifically articulates the test to be adopted when stating ‘the criterion of invalidity selected by s 116’.<sup>112</sup> Legislative ‘purpose... is the only matter to be taken into account in determining whether a law infringes s 116’.<sup>113</sup> Gaudron J contends that:

A law will not be a law for ‘prohibiting the free exercise of any religion’, notwithstanding that, in terms, it does just that or that it operates directly with that consequence, if it is necessary to attain some overriding public purpose or to satisfy some pressing social need... whether the interference with religious freedom, if any, effected... was appropriate and adapted or, which is the same thing, proportionate to the protection and preservation of those people. And as the purpose of a law is to be determined by

---

<sup>110</sup> *Adelaide Company of Jehovah’s Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 122–3 (Latham CJ); cf Puls, above n 63, 161–2.

<sup>111</sup> See e.g. *Krygger v Williams* (1912) 15 CLR 366, 369–371 (Griffith CJ); *Adelaide Company of Jehovah’s Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 123–4 (Latham CJ).

<sup>112</sup> *Kruger v the Commonwealth* (1997) 190 CLR 1, 132 (Gaudron J).

<sup>113</sup> *Ibid.*

reference to ‘the facts with which it deals’, that question would necessarily have to be answered by reference to the conditions of the time in which it operated. However, the answer to the question depends on an analysis of the law’s operation, not on subjective views and perceptions.<sup>114</sup>

It is important to distinguish between the majority’s view of purpose and Gaudron J’s view of purpose as the only matter to be taken into account. When the majority in *Kruger* talks about purpose, they are referring to the sole and explicit purpose of the impugned legislation being to restrict or regulate religion. Justice Gaudron incorporates the effect of a law into her understanding of a law’s purpose as part of examining how the law actually operates; this is emphasised by her caution that any analysis of purpose must be conducted in the context of the specific case. She then discusses the need for proportionality in determining whether a law infringes s 116 – where a law by the Commonwealth actually (in effect as well as purpose) operates to restrict the free exercise of religion, but is reasonably capable of being considered appropriate and adapted to achieving some legitimate overriding public purpose, that law will be valid.<sup>115</sup>

After all, the claim for a more expansive interpretation of free exercise is not to say that there should be no limits at all to free exercise. All the justices who have considered this issue have concluded that free exercise of religion is not absolute. As mentioned in Part II, not every interference with religion is a breach of s 116, but only those which ‘unduly infringe’ upon religious freedom, and restrictions on violent ‘religious’ conduct (such as murder or sacrifice) incompatible with democracy are necessary.<sup>116</sup>

Evans and Ujvari hold that those who oppose anti-discrimination exemptions for religious groups may ‘legitimately question’ this

---

<sup>114</sup> Ibid 133–4 (Gaudron J).

<sup>115</sup> Luke Beck, ‘Clear and Emphatic: The Separation of Church and State Under the Australian Constitution’ (2008) 27 *University of Tasmania Law Review* 161, 184–5.

<sup>116</sup> Evans, above n 14, 297; see generally *Adelaide Company of Jehovah’s Witnesses Inc. v Commonwealth* (1943) 67 CLR 116.

asymmetry which allows laws regarding murder and sacrifice to apply to religious organisations, but sex discrimination laws not to apply. They argue that such an asymmetry implies that ‘discrimination is relatively minor compared to other forms of harm [murder and sacrifice]’ and ‘equality is a goal of limited value’.<sup>117</sup> With respect, the assertion that discrimination is relatively minor compared to murder and sacrifice is technically correct. It seems absurd to advocate otherwise. This is not to undermine the harm that may be suffered as a result of discrimination (there is no doubt that such harm may be real and significant), but to emphasise the far more severe harm of murder and sacrifice, and their utter incompatibility with Australia’s system of representative democracy. As Evans and Ujvari admit, the distinction or ‘asymmetry’ is relative, not absolute. Fundamentally, harm imposed by discrimination is generally not as great in gravity as the harm imposed by murder and sacrifice, which means there is a distinction between the types of harm. This implies that there may also be scope for distinctions relating to how the exemptions operate. Moreover, as mentioned earlier, religious groups and individuals suffer a ‘discrimination’ or ‘inequality’ of a kind when they are subject to anti-discrimination provisions in a way that injures their religious convictions.<sup>118</sup>

This point is related to the second issue identified by Evans and Ujvari. It does not necessarily follow that religious exemptions to anti-discrimination laws imply that equality is a goal of limited value. Rather, what it may imply is that the exemptions are necessary in order to preserve equality.<sup>119</sup> Anti-discrimination provisions fall disproportionately on organisations or individuals with religious convictions that conflict with the provisions, and specific exemptions are required to address this specific situation where there is an unequal or disproportionate application of law.<sup>120</sup>

The need to foster a free and equal society consonant with prioritising democracy entails that freedom and equality must be extended to

---

<sup>117</sup> Evans and Ujvari, above n 82, 42.

<sup>118</sup> Berg, above n 96, 225.

<sup>119</sup> See for example Moens, above n 14, 213–5.

<sup>120</sup> Ibid 225.

religious entities as well as members of the LGBTI community affected by unlawful discrimination, particularly given the specific Constitutional protection of free exercise. However, this freedom and protection must be compatible with democracy. Religions involving murder and sacrifice are not compatible with democracy and therefore do not attract the exemptions or protection by the free exercise clause. Limited discrimination based on sexual orientation may be compatible with democracy and therefore may attract the exemptions, but as discussed in the final part, this article proposes a proportionality test so that there is principled reasoning for whether the free exercise clause is applicable and whether an exemption is appropriate.

Thus, to simply imply that religious exercise will be invalid where it conflicts with the general law is facile and incongruent. For example, Evans and Ujvari claim that ‘religious institutions are supposed to adhere to the general law’.<sup>121</sup> Such a statement is either without reference to the free exercise clause (which seems possible since the clause is not mentioned in their article), or the phrase ‘general law’ cannot mean all Commonwealth law in existence. Invoking the clause to invalidate Commonwealth law prohibiting free exercise assumes the existence of a general law which contravenes the free exercise clause. An interpretation which claims that religious freedom must always bow to Commonwealth law would render the free exercise clause redundant by making it impossible to breach.<sup>122</sup> A more textually and contextually appropriate interpretation is to engage in Gaudron J’s type of proportionality test, where the question of whether a law unduly infringes the protection is left to the Court to determine.<sup>123</sup>

Given the reason for expanding the scope of the free exercise clause involves consistent application of the principles undergirding the implied freedom of political communication, it follows that use of a

---

<sup>121</sup> Evans and Ujvari, above n 83, 42; cf ABC News, above n 3, where Martine Delaney made a similar claim at a more popular level.

<sup>122</sup> See *Adelaide Company of Jehovah’s Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 130 (Latham CJ).

<sup>123</sup> *Ibid* 131 (Latham CJ).

proportionality test ought to consider the High Court's discussions of the applicability, utility and procedures for proportionality under the implied freedom. In *Lange v Australian Broadcasting Corporation*,<sup>124</sup> the High Court first articulated the precise test for determining whether a law breaches the implied freedom:

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfillment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government... if the first question is answered 'yes' and the second is answered 'no', the law is invalid.<sup>125</sup>

In *Coleman v Power*<sup>126</sup> a majority of the High Court recast the second limb of this test (the compatibility and proportionality aspects) to state that the question is whether the impugned law is 'reasonably appropriate and adapted to serve a legitimate end *in a manner which* is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government...'. In *McCloy v New South Wales*, the majority of the High Court observed that the test from *Lange* remained authoritative, but the way the proportionality aspect had been phrased and executed was vague and based on holistic 'impressions', subject to 'value judgments', and lacked 'generally applicable', 'objective criteria'.<sup>127</sup> However, proportionality testing retained 'evident utility as a tool for determining the reasonableness of legislation which restricts the

---

<sup>124</sup> (1997) 189 CLR 520.

<sup>125</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

<sup>126</sup> (2004) 220 CLR 1.

<sup>127</sup> (2015) 325 ALR 15, 32 [66], 35 [74]–[76] (French CJ, Kiefel, Bell and Keane JJ).

freedom and for resolving conflicts between the freedom and the attainment of legislative purpose'.<sup>128</sup>

Therefore, the High Court articulated three specific criteria to give substance and objectivity to the proportionality analysis – the law must be suitable, necessary and adequate in its balance; all three criteria must be satisfied. The law is suitable if it has a rational connection to the purpose of the provision; the law is necessary if there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose with a less restrictive effect on the freedom; and the law is adequate in its balance if a value judgment consistent with the judicial function describes the importance of the purpose served by the restrictive measure as greater than the extent of the restriction it imposes on the freedom.<sup>129</sup> Without entering into substantive debate, this article accepts the general utility of proportionality analysis for the free exercise clause, and agrees with the High Court that the criteria assists with providing more objective criteria for evaluation.<sup>130</sup> What remains, then, is to articulate a possible version of such a test within the expanded view of the free exercise clause.

#### VII PREFERENCE OVER BALANCE: THE FUTURE OF RELIGIOUS FREEDOMS AND ANTI-DISCRIMINATION

This article has suggested that in some circumstances it may be appropriate to privilege religious freedom over anti-discrimination, particularly given the explicit constitutional protection for religious freedom and democratic principles such as the importance of freedom, specifically religious freedom. However, there should be clear and specific legal principles governing when this can occur, including very explicit limits to the scope of application in order to minimise the potential for harm suffered by the LGBTI community resulting from unlawful discrimination.

---

<sup>128</sup> *McCloy v New South Wales* (2015) 325 ALR 15, 35 [73] (French CJ, Kiefel, Bell and Keane JJ).

<sup>129</sup> *Ibid* 18 [2] (French CJ, Kiefel, Bell and Keane JJ).

<sup>130</sup> Cf *McLeish*, above n 28, 235–6; *Puls*, above n 63, 156–7.

In particular, the article has adopted, expanded and developed Gaudron J's textual and contextual arguments in *Kruger* that the current approach to the free exercise clause is too narrow, and ought to be broadened. It argued that this broad approach is more consistent with the priority for democracy reasoning which is the rationale for the High Court's implied freedom of political communication in *Nationwide News* and *Australian Capital Television*. The broader approach should involve the consideration of a law's effect in restricting free exercise of religion, not just its purpose, and the inclusion of individuals as well as organisations.

For example, drawing on Gaudron J's test and the implied freedom of political communication test, the proportionality test for determining whether a law breaches the free exercise clause could be something like this: A law will be a law for prohibiting the free exercise of religion if it restricts the free religious exercise of individuals or organisations in either its purpose or its effect, and if it does so restrict, the interference with free exercise is not reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. That is, the law will not prohibit the free exercise of religion if it is suitable, necessary and adequate, even if it does restrict free exercise.

Without arguing the point here, according to this test (and even the narrower view of free exercise), at the very least religious organisations can discriminate such that any reduction of the current exemptions could breach the free exercise clause. However, Evans and Ujvari contend that even the present exemptions go too far, acknowledging that religious schools 'play an important role' and are 'deserving of some protection of their distinctive worldview', but stating that such protection is 'consistent with the idea that that they should be subject to more aspects of discrimination law than is currently the case in Australia'.<sup>131</sup> In particular, they criticise permitting discrimination to avoid 'injuring religious susceptibilities' on the basis that the phrase is 'rather vague', 'provides little

---

<sup>131</sup> Evans and Ujvari, above n 83, 56.

guidance', and that 'religious freedom does not normally protect religious sensibilities'.<sup>132</sup>

It does seem fair to say that the terms 'sensitivity' and 'susceptibility' are ambiguous as applied to religion. For this reason, religious 'convictions' or 'beliefs' may be more clear terms, at least insofar as religious beliefs of organisations or individuals can be compared with established religious doctrine to see if these convictions are injured (that is, if free exercise is restricted). That will be a question of fact in any given situation. Nevertheless, if we assume the claim of Evans and Ujvari that religious freedom does not protect religious sensibilities also applies to the protection of religious convictions, such a claim represents a comprehensive failure to take into account the operation of the free exercise clause. Even the narrowest view of free exercise involves the protection of religious convictions or beliefs, and even actions consequent on those beliefs.<sup>133</sup> It also involves a constitutional preference for freedom of religion over anti-discrimination.<sup>134</sup>

It follows from the constitutional preference for the free exercise of religion over anti-discrimination that the current anti-discrimination exemptions for religious organisations are justified, so that the organisations are free to exercise their religion in accordance with their religious doctrine. The expanded view of free exercise, taking into account effect as well as purpose, and applying to individuals as well as organisations, arguably justifies additional exemptions for individuals affected in their religious practice by anti-discrimination provisions. The possible test outlined above is a method of undertaking a principled evaluation on a case-by-case basis.

This version of the test, though very preliminary, is compatible with the majority test from *Kruger* and antecedent cases which emphasise the purpose of the law and its consistency with the maintenance of an ordered society, as it incorporates these aspects. However, in

---

<sup>132</sup> Ibid 53.

<sup>133</sup> *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* (1943) 67 CLR 116, 124–25 (Latham CJ).

<sup>134</sup> Mortenson, above n 91, 231.

accordance with priority for democracy principles, it is also broader to allow for the consideration of effect so that the Commonwealth cannot seek to do indirectly what they cannot do directly. Furthermore, consideration of the effect on individuals as well as organisations promotes democracy by harmonising the constitutionally required preference for religious liberty suggested by s 116 with the constitutionally prescribed system of representative government undergirding the implied freedom of communication, which emphasises individual freedom to participate in the democratic process and society in general.

Berg refers to a specific United States example where a wedding photographer was forced to pay \$6,600 in legal fees after declining, on religious grounds, to photograph a same-sex commitment ceremony.<sup>135</sup> This example can serve as a test case for the expanded view of free exercise. If such a situation occurred in Australia in relation to a same-sex marriage ceremony, the photographer could not appeal to an exemption under Commonwealth anti-discrimination legislation. The exemptions only exist for religious institutions or organisations, not individuals or small businesses. Furthermore, the photographer could not appeal to the current view of free exercise as expressed by the majority in *Kruger*, because the anti-discrimination legislation is not for the specific purpose of restricting religious exercise. The legislation would therefore apply, and the wedding photographer would either be compelled to photograph the wedding against their religious convictions or be forced to suffer some legal penalty.

If the expanded view of free exercise applies, the first part of the test (the burden aspect, to follow the language of the implied freedom of political communication) would be satisfied. The anti-discrimination legislation restricts religious exercise in its effect by preventing the wedding photographer from conducting their business in accordance with their religious beliefs. The second part of the test is the compatibility aspect, which asks whether the purpose of the law and the means used to achieve that purpose are compatible with the

---

<sup>135</sup> Berg, above n 96, 206–7; *Elane Photography, LCC v Willock*, 309 P3d 53 (NM, 2013).

constitutionally prescribed system of the representative system of government in the sense that they do not impinge upon the functioning of that system.<sup>136</sup> The purpose of the anti-discrimination legislation is to promote equality in society, and the means used to achieve that purpose is to prohibit discriminatory conduct.

The purpose is clearly legitimate, but prohibiting discriminatory conduct as the means to achieve that purpose may impinge upon the functioning of representative government by preventing the wedding photographer from fully participating as a citizen in society in a way consistent with their religious convictions. So it is necessary to consider the third part of the test, which is the proportionality analysis or whether the anti-discrimination law is suitable, necessary and adequate. The law is plainly suitable as it has a rational connection to its purpose, which is to promote equality by prohibiting unlawful discrimination. The law may not be adequate in the sense that though the importance of promoting equality through preventing discrimination is obviously considerable, the extent of the burden on religious freedom is significant because of the injury to religious conviction or the imposition of a legal penalty for non-compliance. The point is arguable and is a question of fact.

Most importantly, the law is probably not necessary, in the sense that there is an obvious and compelling alternative, reasonably practicable means of achieving the same purpose with a less restrictive effect on the freedom. This would simply be to provide an exemption of the type described earlier: a provision which states that individuals who refuse to offer goods or services in a situation where to do so would conflict with the doctrine and practice of their religion, or who would have their religious convictions offended were they compelled to offer the good or service in that situation, are not subject to the anti-discrimination provisions unless the refusal directly results in 'concrete hardship' for those who seek the service (that is, if there is no equivalent service reasonably available).<sup>137</sup>

---

<sup>136</sup> *McCloy v New South Wales* (2015) 325 ALR 15, 18 [2] (French CJ, Kiefel, Bell and Keane JJ).

<sup>137</sup> Berg, above n 96, 208.

This achieves the purpose of promoting equality by acknowledging the disproportionate effect anti-discrimination legislation has on those with religious objections, and provides a means by which such individuals and businesses can continue meaningfully participating in society without restricting their free exercise.<sup>138</sup> It also achieves the purpose of equality for those discriminated against by imposing a limit on the exemption where there is no other equivalent service reasonably available so that there is no substantive damage or hardship suffered as a result.

It seems the experience of concrete hardship would be a relatively rare case. Certainly, in the situation Berg alludes to, another wedding photographer was found through a friend and there was no evidence presented of any costs incurred for finding another wedding photographer.<sup>139</sup> However, the limit is present and would operate where there is no other wedding photographer reasonably available. Price, skill and geographical factors could be considered in that evaluation. Furthermore, if a service provider was 'holding out' on someone seeking the service, and deliberately causing hardship and anxiety rather than genuinely avoiding compromise on a religious conviction, the exemption would not apply.

Including relevant and appropriate exemptions for discrimination by religious individuals as well as organisations facilitates religious speech and conduct which contributes towards democracy. The test also imposes limits where religious speech and conduct is not reasonably appropriate and not compatible with the fostering of democracy; unreasonable and/or malicious conduct, insults, incitement, violence, oppression and the like would not be allowed, but debate and discussion and disagreement over what marriage is, including religious perspectives which could affect voting and the ability to reasonably refuse services which injure religious convictions, would be allowed. This assists in maintaining a pluralist democracy without conflicting with the constitutional preference for religious liberty. Ultimately, whatever one thinks of these proposals,

---

<sup>138</sup> Ibid 225.

<sup>139</sup> Ibid 206–7; *Elane Photography, LLC v Willock*, 309 P 3d 53 (NM, 2013).

what is certain is that the conversation needs to occur. The intrinsic tension between religious freedom and anti-discrimination will only increase; this much is suggested by the recent proliferation of relevant cases. To address such an important emerging issue, the scope of the free exercise clause should be clearly and appropriately articulated for the benefit of judges, legislators, and the public which comprise the Australian democracy.

## THE JURY TRIAL IN WESTERN AUSTRALIA: COMPARATIVE OBSERVATIONS

WOUTER L DE VOS\*

### Abstract

*Jury Trials – Judge Only Trials – Western Australia – South Africa – Procedure – Comparison – Judicial Assessors – Historical Perspective – Salient Features of Jury Trials*

*This article commences with a brief note on the historical background of the jury system and the role it played in the development of the character of the common law trial process. It thereafter analyses the salient features of the jury trial in Western Australia ('WA') and considers its advantages and disadvantages. The article also takes a brief look at trials by judge alone in this State. It proceeds to discuss the trial by judge and legally-trained assessors in South Africa, suggesting this process as a viable compromise between a jury trial on the one hand and a judge alone trial on the other. It concludes that a trial by judge and assessors would be more efficient and streamlined and therefore less time-consuming and costly than a jury trial. Further, because this mode of trial involves three legal minds considering the issues, it would offer greater assurance of a correct factual outcome than a judge alone trial.*

### I INTRODUCTION

From its inception around the middle of the twelfth century in England under the influence of King Henry II, the jury has developed

---

\* Associate professor of law, Curtin University; emeritus professor of law, University of Cape Town, South Africa; advocate of the High Court of South Africa. The author wishes to express his gratitude to Prof Andrew Paizes and Ms Jennifer Porter for their valuable comments on the draft of this article.

into an outstanding feature of the Anglo-American trial process.<sup>1</sup> In the beginning, a group of honest men from a neighborhood were called up by the King or one of his officials to give sworn answers to questions relating to incidents about which they had personal knowledge. Such incidents included the commission of crimes and the dispossession of land. Henry II used this inquest, which was a Norman custom, because he had to restore order to the land which had been torn apart by anarchy prior to his ascension to the English throne. The information obtained from the men enabled the King to punish those who had committed atrocities and to keep the peace.<sup>2</sup>

Over the course of the next two centuries, this body of men, known as *jurata*, now regularly comprising twelve members named *juratores*, assumed a very different role. By the late fourteenth century, the jurors were called up not only to answer questions posed by a judge but also to give a verdict on evidence given by witnesses.<sup>3</sup> The latter function prevailed and by the seventeenth century, it was stated that a witness ‘swears but to what he hath heard or seen to what hath fallen under his senses... But a jury-man swears to what he can infer and conclude from the testimony of such witnesses...’<sup>4</sup> Thus, while in the twelfth century personal knowledge of the incident in question was a prerequisite to be called up by the King to answer questions under oath, such knowledge on the part of a juror by the

---

<sup>1</sup> The birth of the jury is traced in Wouter L De Vos, ‘The Jury Trial: English and French Connections’ (2008) 2 TSAR 196 with reference to, *inter alia*, Sir Frederick Pollock and Frederick Maitland I, *History of English Law before the time of Edward I* (Cambridge University Press, 1<sup>st</sup> ed, 1898) 139; Sir Victor Windeyer, *Lectures on Legal History* (Sydney Law Book Company, 2<sup>nd</sup> ed, 1957) 60; Kevin M Clermont, *Principles of Civil Procedure* (MN West Publishing, 1<sup>st</sup> ed, 2005) 12; JH Baker, *An Introduction to English Legal History* (Butterworths and Co Publishers, 4<sup>th</sup> ed, 1990) 86. See also William Forsyth, *History of Trial by Jury* (The Law Book Exchange, 2<sup>nd</sup> ed, 1875) 11 for a different view.

<sup>2</sup> De Vos, above n 1, 197.

<sup>3</sup> Baker, above n 1, 87.

<sup>4</sup> *The King v Penn and Mead (Buschel’s Case)* (1670) 124 ER 1006, 1009 (S. C. Vaughn).

seventeenth century became a ground for disqualifying him from serving on the jury.<sup>5</sup>

Since jurors were lay-men, judges presiding at jury trials deemed it necessary to develop elaborate rules governing the adjudication of cases. The presence of the jury was therefore a determining factor in the development over centuries of the character of the common law trial process. To be more specific, the role of the jury as the finder of fact in due course gave rise to the features discussed below.<sup>6</sup>

The common law trial is a continuous, concentrated process during which the parties present all their evidence. The emphasis is on oral evidence, which is presented directly to the court rather than through an intermediary. Even when a party presents documentary evidence or real evidence, a witness would usually be asked to identify the document or object for what it purports to be. Cross-examination forms a crucial part of the presentation of oral evidence. Furthermore, the proceedings commence with counsels' oral opening addresses and conclude with counsels' oral closing addresses. Kotz compares counsel's role to that of a playwright; the playwright conveys his or her story to the audience through the spoken word of actors.<sup>7</sup> Similarly, counsel presents his or her case to the jury through the spoken word of witnesses. According to Kotz, it 'would make little sense in practice to make jurors read and evaluate complicated documentary evidence'.<sup>8</sup> He also argues that the proceedings must be concentrated because it would not make practical sense to assemble, dismiss and reconvene the jury from time to time.<sup>9</sup>

---

<sup>5</sup> *AK v The State of Western Australia* (2008) 232 CLR 438, 471 [91] (Heydon J).

<sup>6</sup> Cf Pamela-Jane Schwikkard and S E Van der Merwe, *Principles of Evidence* (Juta Legal and Academic Publishers, 4<sup>th</sup> ed, 2016) 5; Hein Kotz, 'The Role of The Judge in the Court-room: the Common Law and Civil Law Compared' (1987) 1 TSAR 35, 39–40.

<sup>7</sup> Hein Kotz, above n 3, 39.

<sup>8</sup> *Ibid* 39.

<sup>9</sup> *Ibid* 40.

The common law system is characterised by a large body of rules excluding certain types of evidence, such as character evidence, opinion evidence and hearsay. These exclusionary rules, dealing with the admissibility of evidence, were developed by the English judges because they feared that the jury, being lay-men, ‘might be misled or distracted by, or might... attach undue weight to, certain categories of evidence... which, according to the judges, were notoriously untrustworthy’.<sup>10</sup>

The common law system also recognises a body of rules relating to aspects of the assessment or evaluation of evidence. These rules developed in the context of the judge’s directions to the jury before they proceeded to deliberate their verdict. In the case of certain types of evidence, which experience had shown to be suspect, such as the testimony of an accomplice, the judge would warn the jury of the dangers involved in accepting such evidence without corroboration or some other indication of trustworthiness. In other words, in the case of such a warning from the judge, the jury had to assess the evidence in question with caution. In South Africa, where the jury trial in both civil and criminal cases was abolished a long time ago, these rules are referred to as ‘cautionary rules’.<sup>11</sup>

Being a former British colony, WA, like other states in Australia, inherited the jury trial in both civil and criminal cases.<sup>12</sup> However, in recent times there has been a general decline in the use of juries in civil cases. By means of legislation in the different jurisdictions, there has been a gradual move towards a judge alone trial in civil cases.<sup>13</sup>

---

<sup>10</sup> Schwikkard and Van der Merwe, above n 3, 5.

<sup>11</sup> DT Zeffertt and AP Paizes, *The South African Law of Evidence* (LexisNexis, 2<sup>nd</sup> ed, 2003) 961.

<sup>12</sup> See Law Reform Commission of Western Australia, *Jury Trials in Western Australia* Discussion Paper No 8 (2010). The introduction of juries in Western Australia occurred in 1830, making this colony, which was only founded in 1829, the first of the colonies in Australia to adopt this mode of trial.

<sup>13</sup> Cf *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478, 491 [32] (Kirby and Callinan JJ); Stephen Colbran et al, *Civil Procedure: Commentary and Materials* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2012) 903–909; Bernard Cairns, *Australian Civil Procedure* (Thomson Reuters, 11<sup>th</sup> ed, 2016) 648.

However, the extent of this decline has not been the same in all the States and Territories. Some jurisdictions, like Tasmania, have virtually abandoned this mode of trial, while it is still in use to a limited extent in others, like Victoria.<sup>14</sup> In WA, provision is still made for a jury trial in civil actions, but it can only take place if a judge gives an order to that effect on application of a party.<sup>15</sup> However, it seems likely that it may fall into disuse or finally be abolished by legislation. The Law Reform Commission of WA reported that the last civil jury trial in this state occurred in 1994 and in the four decades prior to that, only about a dozen such trials took place.<sup>16</sup>

This article focuses on the use of jury trials in criminal cases in WA.<sup>17</sup> Such trials take place in both the Supreme Court and the District Court.<sup>18</sup> The discussion will, however, concentrate specifically on the Supreme Court. The paper will extract the salient features of this mode of trial and consider its advantages and disadvantages. It will also take a brief look at judge alone trials. The paper will then proceed to compare the typical features of the jury trial with the South African system, which provides for a trial by a judge and two legally trained assessors in the case of criminal trials in the High Court. The question

---

<sup>14</sup> Cairns, above n 13, 648; Colbran, above n 10, 902.

<sup>15</sup> *Juries Act 1957* (WA), s 44; *Supreme Court Act 1935* (WA), s 42; *Supreme Court Rules 1971* (WA), O 32 r 2; Colbran, above n 13, 902. See also *Rayney v The State of Western Australia (No 7)* [2016] WASC 288 (Chaney J), in which the defendant's application for a jury trial in an action for defamation was refused.

<sup>16</sup> Law Reform Commission of Western Australia, above n 12, 11.

<sup>17</sup> Jury trials in cases involving federal crimes fall outside the ambit of this paper. uch trials are subject to s 80 of the Australian Constitution which provides that '[t]he trial on indictment of any offence against any law of the Commonwealth shall be by jury'. See *Alqudsi v The Queen* [2016] HCA 24, in which the accused's bid to have his case, involving serious federal crimes, heard by a judge alone failed by a majority decision on the basis that such a trial would be inconsistent with s 80 of the Constitution.

<sup>18</sup> E Colvin, J McKechnie and J O'Leary, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2014) 755.

of whether the jury trial is still desirable in WA, or whether a trial by a judge and two legally training assessors constitutes a viable option in its place, will finally be considered.

## II SALIENT FEATURES OF THE JURY TRIAL IN WESTERN AUSTRALIA

### *A General*

Apart from identifying the salient features of the jury trial, this section will also show that, although the jury plays a very passive role throughout the proceedings, its presence dominates virtually all facets of the trial. The presence of jurors, as the finders of fact, requires the judge to guide them by giving explanations and directions from the beginning of the trial right up to the stage when they retire to consider their verdict. The purpose of this judicial guidance, in the author's opinion, is to ensure that the jurors stay on track and understand what is required of them.

### *B Features of the jury trial*<sup>19</sup>

The arraignment of the accused occurs at the very beginning of the trial when the pool of would-be jurors has been convened at the back of the court and, therefore, before the empanelment of the jury.<sup>20</sup> The charge is read to the accused by the judge's associate and the accused then pleads. If the accused pleads not guilty his or her right to have a jury empanelled is triggered. The presence of the jury pool at the back of the court during this process ensures that the would-be jurors hear the name of the accused and the nature of the charge. This enables a selected juror who has a concern regarding the accused or the nature of the charge, which might cause him or her to be biased, to raise such

---

<sup>19</sup> The description of these features is mainly based on the following sources: *Juries Act 1957* (WA); *Criminal Procedure Act 2004* (WA) ss 101–16; Colvin, above n 15, 755–59; Law Reform Commission of Western Australia, above n 13.

<sup>20</sup> This is based on the author's observations in the Supreme Court of Western Australia.

a concern with the judge. The discussion in this paper proceeds on the basis that the accused pleads not guilty.<sup>21</sup>

The selection of would-be jurors and the actual empanelment of the jury to try the case at hand are intricate processes governed by elaborate legislative provisions.<sup>22</sup> Needless to say, time needs to be set aside for these processes to be concluded prior to the commencement of the trial proceedings. The main actors in the selection and empanelment of the jury are the summoning officer (usually the ‘sheriff’) and the judge’s associate (‘proper officer according to the *Juries Act*’<sup>23</sup>).<sup>24</sup> The judge plays a limited role, in that he or she may excuse people summoned from jury duty if they have not already been excused by the summoning officer.<sup>25</sup> Further detail of these procedures is beyond the scope of this paper; the focus will be on the judicial guidance given to the jury by the judge and the role of counsel for the State and the defence during the course of the actual trial.

### 1 *The judge informs jury of the case and their role in the proceedings*

After the 12 jurors, and up to six reserve jurors,<sup>26</sup> have been empanelled and sworn in, the judge must inform them of the case against the accused and their duties as jurors.<sup>27</sup> After the judge has informed the jury of the case and their duties, he or she instructs the jury to retire to select a foreperson. Once this task is complete and the jury has returned to the courtroom, the stage is set for the trial to proceed.

---

<sup>21</sup> See *Juries Act 1957* (WA) s 107 which deals with the procedure in case of a plea of guilty.

<sup>22</sup> *Juries Act 1957* (WA) ss 4–51; Colvin, above n 15, 756–757.

<sup>23</sup> *Juries Act 1957* (WA) s 36.

<sup>24</sup> *Ibid* ss 21–43A.

<sup>25</sup> *Ibid* ss 34F–34J.

<sup>26</sup> *Ibid* s 18.

<sup>27</sup> *Ibid* s 106.

## *2 Opening addresses by counsel*

Generally, this is followed by the prosecuting counsel's opening address to the Court.<sup>28</sup> In this address, counsel would set out what the charges against the accused are and what evidence the state proposes to present in support of its case. If there is more than one charge and a number of witnesses to be called, it may be a lengthy address. The *Criminal Procedure Act 2004* (WA) states that the address is given to the court,<sup>29</sup> but since the jury is the finder of fact, counsel would in fact primarily address the jurors to ensure that they know at the outset exactly what the case is about.

Defence counsel may also give an opening address, either immediately after the prosecutor's address or, if the accused intends to present evidence, after the close of the state's case and immediately before the defence presents its evidence.<sup>30</sup> The prosecuting counsel's address is of special importance because it is the first layout of the State's case presented to the jury. The prosecutor usually stresses that his or her address consists only of comments and that it is up to the members of the jury to find the facts.

## *3 Legal issues*

The jury is charged to determine only the facts. Any legal issue that arises must, therefore, be decided by the judge alone. The practice is that when such an issue arises for determination, the jury would be excused and the judge and counsel would proceed with the matter. Counsel would be afforded the opportunity to address the judge on the issue, whereafter the latter would give a ruling. A specific issue that frequently arises for decision is the admissibility of evidence. If this issue arises after commencement of the trial, the judge would excuse the jury and direct a *voir dire* (or 'trial within a trial') to be

---

<sup>28</sup> *Criminal Procedure Act 2004* (WA) s 143.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Criminal Procedure Act 2004* (WA) s 143 uses the words 'give or adduce evidence,' which seem to embrace the evidence of both the accused and other witnesses for the defence.

held to decide the matter.<sup>31</sup> However, it is often known by counsel prior to the trial that an issue relating to the admissibility of certain evidence may arise and such an issue is usually brought before a judge by application before the trial.<sup>32</sup> After hearing arguments from counsel, the judge gives a ruling. In the author's view, the aim of this procedure is clearly to expedite the trial proceedings.

#### *4 Judge's explanations and directions during the course of the trial*

Whenever any step is taken during the course of the trial that requires clarification for the benefit of the jury, the judge will intervene and explain the process to the jurors and, if necessary, give a direction to them in this regard. An illustration of such a scenario is, for example, where a witness gives evidence by way of a video link from a remote room in the court house. This is the standard procedure followed with complainants in sexual offence cases in the Supreme Court of WA. In such a case, the judge would explain this to the jurors and direct them not to make any negative inference against the accused because the complainant is not physically present in court.<sup>33</sup>

#### *5 Closing addresses by counsel*

After both parties have presented all their evidence, counsel are given the opportunity to deliver their closing addresses, in which they endeavour to persuade the jury to find in their favour. The prosecutor's address is given first, followed by the defence.<sup>34</sup> Where there are several charges and a number of witnesses involved, these addresses may be lengthy, each analysing all the evidence with a view to swaying the jury to counsel's cause.<sup>35</sup>

---

<sup>31</sup> Colvin, above n 15, 561.

<sup>32</sup> Ibid; see also *Western Australia v Jordan Quong Vo* [2015] WASC 389.

<sup>33</sup> *Evidence Act 1906* (WA) s 106R(7).

<sup>34</sup> *Criminal Procedure Act 2004* (WA) s 145.

<sup>35</sup> This was borne out by the author's own observations in one of the cases that he observed.

### 6 Summing up by the judge

After the closing addresses of prosecuting and defence counsel, and before the jury retires to deliberate, the judge must address the jurors on the task required of them. This address, called the judge's 'summing up',<sup>36</sup> may be described as an elaborate speech in which the judge endeavours to guide the jurors on the applicable law and their task of assessing the evidence.<sup>37</sup> In the context of a jury trial, the judge's summing up fulfils a very important role; it not only serves as guidance to the jury in the performance of their task but, as discussed further below, it is also an important tool in the appeal process. Since there are no reasons given for the jury's verdict, the judge's summing up is the most important source to be considered by lawyers for the defence with a view to lodging an appeal.

During the trial, the main evidentiary concern in presenting the parties' cases is the admissibility of evidence. The assessment or evaluation of evidence is not an issue at that stage. However, at the end of the trial when the judge gives the summing up, the rules governing the assessment of evidence come into play in the directions he or she gives to the jury. In a trial without a jury, the judge would of course deal with these rules in the court's judgement to explain how the court reached its decision. These rules derive mainly from the common law but some of them have been modified by legislation.<sup>38</sup> Others have been created by legislation to do away with outdated common law rules.<sup>39</sup> One can safely say that all these rules have been the subject of judicial interpretation by the Supreme Courts and High Court of Australia. In accordance with the usual practice in

---

<sup>36</sup> Andrew Hemming, Miko Kumar and Elizabeth Peden, *Evidence: Commentary and Materials* (Thomson Reuters, 8<sup>th</sup> ed, 2013) 5.

<sup>37</sup> *Ibid.*

<sup>38</sup> See, eg, *Evidence Act 1906* (WA) s 31A dealing with propensity evidence.

<sup>39</sup> For example, *Evidence Act 1906* (WA) ss 36B and 36BA respectively dealing with evidence of the sexual reputation and sexual disposition of the complainant in a sexual offence case. See also *Evidence Act 1906* (WA) s 50 dealing with a corroboration warning to the jury.

Australia, the rules governing the assessment of evidence are generally referred to by the name of the cases in which they have been applied.<sup>40</sup>

The judicial task of summing up for the jury is a very difficult one fraught with many pitfalls, which is borne out by numerous appeal court judgments. The *Criminal Procedure Act* provides the following guidance:

After addresses have been made ... and before the jury retires to consider its verdict, the judge must instruct the jury on the law applicable to the case and may make any observations about the evidence that the judge thinks necessary in the interests of justice.<sup>41</sup>

Case law dealing with both this section and the duty of the judge in general to sum up the case for the jury indicates that the following considerations are pertinent in this context.

The section commands the judge to instruct the jury on the law. In *RPS v R* ('*RSP v R*')<sup>42</sup> the majority judgment stated:

The fundamental task of a trial judge is ... to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues.<sup>43</sup>

---

<sup>40</sup> For example, the rule in *Longman v R* (1989) 168 CLR 79, which dealt with the scenario where there was a very long delay before a sexual complaint was laid.

<sup>41</sup> *Criminal Procedure Act 2004* (WA) s 112.

<sup>42</sup> (2000) 199 CLR 620.

<sup>43</sup> *Ibid* 637 [41] (Gaudron CJ, Gumow, Kirby and Hayne JJ).

The court added that in ‘some cases it will require the judge to warn the jury about how they should not reason, or about particular care that must be shown before accepting certain kinds of evidence’.<sup>44</sup> This would be the same as giving the jury a direction.

The judgment proceeds by referring to the judge’s ability to comment on the factual issues, which seems to correspond to the *Criminal Procedure Act* empowering the judge to make any observation about the evidence. Commenting on the facts is a tricky horse to ride and judges have sometimes gone astray in doing so. In *RPS v R*, the majority judgment gave the following guidance:

[A] trial judge may comment (and comment strongly) on factual issues. But although a trial judge may comment on the facts, the judge is not bound to do so except to the extent that the judge’s other functions require it. Often, perhaps much more often than not, the safer course for a trial judge will be to make no comment on the facts beyond reminding the jury, in the course of identifying the issues before them, of the arguments of counsel.<sup>45</sup>

The reason for this cautious approach is that judicial comments that go beyond the permissible limits may influence the jurors in their fact-finding mission. Such comments would amount to a misdirection that may cause a miscarriage of justice.<sup>46</sup> It would equally constitute a misdirection if the trial judge directs the jury incorrectly on the law, or on the way it should assess the evidence,<sup>47</sup> or if the judge fails to give a direction where one is called for.<sup>48</sup>

---

<sup>44</sup> Ibid.

<sup>45</sup> Ibid 637 [42] (Gaudron CJ, Gummow, Kirby and Hayne JJ).

<sup>46</sup> Ibid 637 [43] ((Gaudron CJ, Gummow, Kirby and Hayne JJ), 644 [64] (Callinan J).

<sup>47</sup> Ibid 632 [40] (Gaudron CJ, Gummow, Kirby and Hayne JJ).

<sup>48</sup> (2008) 232 CLR 397, 403–404 [17]–[18] (Gleeson CJ Gummow, Kirby and Kiefel JJ).

Case law on this function of the judge emphasises the importance of the distinction between a direction and a comment. In *Mahmood v State of Western Australia*<sup>49</sup> the majority judgment explains:

Telling a jury that they may attach particular significance to a fact, or in this case suggesting that other evidence may be considered of greater weight, is comment. Because it is comment it may be ignored by the jury, a matter about which the jury should be told. A direction, on the other hand, may contain warnings about the care needed in assessing some evidence or the use to which it may be put. A direction is something which the law requires the trial judge to give to the jury and which they must heed.<sup>50</sup>

Although it is not stated explicitly in this dictum that the judge must tell the jury that they are obliged by law to follow the judge's directions, it really speaks for itself.

If the circumstances require the judge to give a summary of the competing cases of the prosecution and defence, the judge must clearly identify the issues to be resolved and summarise the competing cases in such a way that ensures justice is done to both sides. If, for example, the judge over-emphasises the prosecution's case in a lengthy address and thereafter merely gives a very brief synopsis of the accused's case, that would infringe the latter's right to a fair trial, causing a miscarriage of the trial.

A case in point is *The State of Western Australia v Pollock* ('*Pollock*'),<sup>51</sup> where Martin CJ commented as follows:

There may be cases in which the addresses of counsel on the facts will obviate the need for a judicial address covering the same ground. However, in my view, this is not such a case. This was a case in which the breadth and complexity of the issues canvassed by counsel in the course of their addresses required

---

<sup>49</sup> Ibid.

<sup>50</sup> Ibid 403 [16] (Gleeson CJ, Gummow, Kirby and Kiefel JJ).

<sup>51</sup> (2009) 195 A Crim R 527.

the trial judge, as part of his obligation to ensure a fair trial, to provide to the jury, with his imprimatur, a succinct summary of the competing evidence bearing upon those issues. And of course the trial judge was required to do so in a way which struck the balance evenly as between prosecution and defence.<sup>52</sup>

The trial judge did not comply with these principles. The brevity of the judge's reference to the accused's case stood in contrast to his lengthy address on the prosecution's case and the judge failed to provide 'the jury with the succinct synthesis of the principal factual issues, and the competing evidence on those issues, which the circumstances of this case required'.<sup>53</sup>

### 7 The jury's verdict

Upon conclusion of the judge's summing up, the jury retires to consider its verdict. Once the jurors have reached a verdict they return to the court room and deliver it through their foreperson. In the case of a murder charge, the verdict must be unanimous but for other crimes, a majority of at least 10 jurors will suffice.<sup>54</sup> Generally, there are only two possible verdicts; 'guilty' or 'not guilty'.<sup>55</sup> If the jury cannot reach a the required majority, the trial judge will discharge the jury, bringing the trial to an end. This is known as a 'hung jury'.<sup>56</sup> In such an event, the prosecution may decide to put the accused on trial

---

<sup>52</sup> Ibid 533 [12] (Martin CJ). See also *Donaldson v The State of Western Australia* (2007) 176 A Crim R 488 [117] (Buss JA).

<sup>53</sup> *The State of Western Australia v Pollock* (2009) 195 A Crim R 527, 537 [23] (Miller JA).

<sup>54</sup> *Criminal Procedure Act 2004* (WA) s 114.

<sup>55</sup> *Criminal Procedure Act 2004* (WA) s 113 also provides for a special verdict in *inter alia* the case where the jury must decide if the accused was not criminally responsible for the act charged on account of unsoundness of mind. The judge must then direct the jury that if it finds the accused not guilty on that account it must return a special verdict to that effect. However, since most trials involving a plea of insanity are decided by a judge alone it is doubtful whether this provision is frequently applied.

<sup>56</sup> Colvin, above n 18, 757; David Field and Kate Offer, *Western Australian Evidence Law* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2015) 62.

for a second time.<sup>57</sup> As alluded to before, the jury does not provide any reasons for its verdict. In fact, the jury is not allowed to give reasons for its verdict and the jurors may not be asked what the reasons for their verdict were.<sup>58</sup>

### 8 *The appeal process*

Since no reasons are given for the jury's verdict one cannot do more than speculate in any given case as to what motivated the jurors in their deliberation behind closed doors. It is true that they have the benefit of the judge's guidance on the law and their fact-finding task, but in the end one can never know what weighed with them and what did not. Needless to say, this complicates the appeal process. In a trial without a jury, the judge's judgment may be analysed by counsel with a view to finding possible grounds for an appeal, and the court of appeal may likewise have regard to the trial court's reasons for its decision in order to decide if it erred or not. On the other hand, in a jury trial, the judge's summing up is the most important indicator of what possibly motivated the jury's verdict. Hence, it would usually be the focus of counsel lodging and opposing an appeal; naturally, it would also be scrutinized by the court of appeal.<sup>59</sup>

If an appeal succeeds, the court of appeal will usually quash the conviction and order a new trial. In other words, the court of appeal would, as a rule, not substitute the conviction for an acquittal. The reason for this approach is the notion that the guilt or innocence of an accused should, as far as possible, always be determined by a jury's

---

<sup>57</sup> Colvin, above n 18, 757; Field and Offer, above n 53, 62.

<sup>58</sup> *AK v The State of Western Australia* (2008) 232 CLR 438, 475 [99] (Heydon J).

<sup>59</sup> See generally *Mahmood v State of Western Australia* (2008) 232 CLR 397; *RPS v R* (2000) 199 CLR 620; *The State of Western Australia v Pollock* (2009) 195 A Crim R 527; *Donaldson v The State of Western Australia* (2007) 176 A Crim R 488, 524–529 [109]–[124] (Buss JA); *R v Duncan* [2015] SASCF 191; *R v Peel* [1998] QCA 371; *R v Cavkic* (2005) 155 A Crim R 275; *The Queen v GW* (2016) 90 ALJR 407.

verdict. That seems to be an inevitable consequence of the jury system.<sup>60</sup> The insistence on a jury's verdict, coupled with the possibility of a hung jury, means that an accused may be subjected to two or three and perhaps even more trials. *Demirok v R*<sup>61</sup> provides an apt illustration of this scenario. After being convicted in the first trial in the Supreme Court of Victoria, the accused succeeded with his appeal to the Court of Criminal Appeal in Victoria and a new trial was ordered. The accused was tried again but the jury failed to agree and was discharged by the judge.

A third trial followed and the accused was convicted again. After failing with an appeal to the Court of Criminal Appeal, he successfully appealed to the High Court. The majority found that an irregular procedure followed during the trial caused a miscarriage of justice. Four judges of a bench of five upheld the appeal and three of them joined in ordering a new trial.<sup>62</sup> This meant that the accused was to be tried a fourth time. Murphy J, the fourth judge upholding the appeal, was however of the view that considerations concerning the rule against double jeopardy militated against ordering a new trial and that a verdict of not guilty should be entered. His Honour reasoned as follows:

A balance must be achieved between the interests of society in prosecuting charges and the interests of society and the individual in avoiding multiple criminal trials... Whatever steps may be taken to exclude prejudice, an accused who goes to a third [or a fourth] trial is under an enormous handicap compared to one facing a first trial. The danger that the jury will know of his earlier convictions is high. Repeated trials increase the possibility that even an innocent accused may be found guilty.<sup>63</sup>

---

<sup>60</sup> *Daniels v The State of Western Australia* (2012) 226 A Crim R 61, 84 [129] (Mazza JA), referring to *Anderson v The Queen* (1991) 53 A Crim R 421.

<sup>61</sup> (1977) 137 CLR 20.

<sup>62</sup> Gibbs, Stephen and Aickin JJ ordered a new trial.

<sup>63</sup> *Demirok v R* (1977) 137 CLR 20, 22 [10]–[11] (Barwick CJ).

It is noteworthy that the accused was again convicted in the fourth trial and his appeal to the Court of Criminal Appeal failed, finally ending the saga.<sup>64</sup>

Other considerations, which may persuade a court of appeal to quash a conviction and replace it by an acquittal, include:

- a) If the court of appeal is of the view that it was not reasonably open to the jury to convict the accused.<sup>65</sup>
- b) If the prosecution's case against the accused is very weak.<sup>66</sup>
- c) Where conditions in society would make it impossible to ensure a fair trial by a jury for the accused.<sup>67</sup>

However, case law indicates that such an outcome is confined to exceptional cases. As a rule, the appeal court upholding an appeal would order a new trial.

### *C Advantages and disadvantages of the jury trial*

For centuries, the jury trial has been regarded by many as a bastion of English individual liberties.<sup>68</sup> However, as shown above, that was certainly not the motivation of King Henry II and his officials when they started using the Norman inquest procedure to obtain information from honest men about certain events in different neighbourhoods.<sup>69</sup> Pollock and Maitland remarked aptly that, although the jury has been described as a 'palladium of [English]

---

<sup>64</sup> See *The Queen v Duran Demirok* [1978] VicSC 286, in which this history is set out.

<sup>65</sup> *Daniels v The State of Western Australia* (2012) 226 A Crim R 61, 84 [129] (Buss JA), citing *Anderson v The Queen* (1991) 53 A Crim R 421.

<sup>66</sup> *R v Peel* [1998] QCA 371 [37]–[43] (Williams J).

<sup>67</sup> *Tuckiar v R* (1934) 52 CLR 335 (Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ).

<sup>68</sup> Cf Lord Devlin, *Trial by Jury* (Stevens & Sons Ltd, 1<sup>st</sup> ed, 1966) 164 quoted in *AK v The State of Western Australia* (2008) 232 CLR 438, 470 [90] (Heydon J).

<sup>69</sup> Devlin, above n 65, 1.

liberties' it is in its origin 'not English but Frankish, not popular but royal'.<sup>70</sup> It can however be accepted that in the centuries following the birth of the jury, it developed into an institution of liberty. As Heydon J pointed out in *AK v The State of Western Australia* ('*AK v WA*'),<sup>71</sup> the 'jury was so greatly valued by the framers of the United States Constitution that it was guaranteed by the Sixth Amendment'.<sup>72</sup>

France also offers an example of the English jury's influence. The jury did not develop in France as it did in England because it was 'overwhelmed by the spread of the romano-canonical procedure' during the Middle Ages when darkness settled over Europe.<sup>73</sup> However, after the French Revolution, the revolutionary fathers, in their quest to transform the judiciary, adopted a jury trial in France based on the English model. They 'saw in the English jury an important popular institution, which involved the ordinary people in the judicial process and contained the power of the judiciary'.<sup>74</sup> Turning to the present-day jury trial in WA, the question arises: what possible advantages and disadvantages of this mode of adjudication may be discerned?

### 1 Advantages

A number of advantages of this mode of trial have been highlighted by various advocates. According to the Law Reform Commission of Western Australia ('Commission'), the jury trial in Australia can be seen as the 'chief guardian of liberty under the law and the community's guarantee of sound administration of criminal justice'.<sup>75</sup> The Commission elaborates by quoting another judicial *dictum*:<sup>76</sup>

---

<sup>70</sup> Pollock and Maitland, above n 1, 142.

<sup>71</sup> (2008) 232 CLR 438.

<sup>72</sup> Ibid 470 [90] (Heydon J).

<sup>73</sup> Pollock and Maitland, above n 1, 141; Wouter L De Vos, above, n 1, 198.

<sup>74</sup> De Vos, above n 1, 199; R Munday, 'Jury Trial, Continental Style' (1993) 13 *Legal Studies* 204, 206.

<sup>75</sup> Law Reform Commission of WA, above n 13, 11, referring to *Brown v R* (1986) 160 CLR 171, 197 (Brennan J).

<sup>76</sup> *Kingswell v R* (1985) 159 CLR 264, 301 (Deane J).

The institution of trial by jury... serves the function of protecting both the administration of justice and the accused from the rash judgment and prejudices of the community itself. The nature of the jury as a body of ordinary citizens called from the community to try the particular case offers some assurance that the community as a whole will be more likely to accept the jury's verdict than it would be to accept the judgment of a judge or magistrate who might be, or be portrayed as being, over-responsive to authority or remote from the affairs and concerns of ordinary people.<sup>77</sup>

The Commission further states that 'the participation of the public, as jury members, in the administration of justice in turn legitimises the criminal justice system'.<sup>78</sup> It adds that the jury 'fosters the ideal of equality' and 'helps to ensure that, in the interests of the community generally, the administration of criminal justice is, and has the appearance of being, unbiased and detached'.<sup>79</sup> According to the Commission the involvement of the community in the administration of justice 'is perhaps the chief argument for the retention of the jury system'.<sup>80</sup> The Commission concedes that the efficiency of the jury as a tribunal of fact may be questionable but adds that 'the public confidence in the administration of justice that is engendered by the mere existence of the jury system is invaluable'.<sup>81</sup> It could also be argued that the institution of the jury strengthens the independence of the judicial function from the other branches of state power, in that the jury is a separate entity owing no allegiance or explanation to the presiding judge or any other judicial officer. It is, therefore, totally independent.<sup>82</sup>

---

<sup>77</sup> Law Reform Commission of Western Australia, above n 13, 11.

<sup>78</sup> *Ibid.*

<sup>79</sup> Law Reform Commission of Western Australia, above n 13, 11 quoting *Brown v R* (1986) 160 CLR 171, 202 (Deane J).

<sup>80</sup> Law Reform Commission of Western Australia, above n 13, 11.

<sup>81</sup> *Ibid.*

<sup>82</sup> However, it could be argued that the absence of a duty to explain its verdict is also a fatal flaw of this mode of trial.

The virtues of the jury have been praised by other eminent commentators, including Lord Devlin, who referred to the trial by jury as ‘the lamp that shows that freedom lives’.<sup>83</sup> Lord Devlin added:

Trial by jury means a compounding of the legal mind with the lay. The prescription for this compound has been one of the greatest achievements of the common law.<sup>84</sup>

Tim Wilson, another supporter of the jury system and a policy director at the Institute of Public Affairs, remarked in a debate:

[I]t’s fairer for a wrongly accused innocent person to face the majority judgment of a dozen of their peers than a well-educated but similarly fallible individual. No one disagrees that judges have strengths: not least knowledge of the practice and application of the law. But in cases where establishing that certain events occurred without clear facts, the judgment of the many is more comforting than the few.<sup>85</sup>

In a nutshell, the salient qualities of the jury trial may be summarised by saying that it provides for the involvement of the community in the administration of justice and assures the accused charged with crime of a judgment by their peers. The community’s participation in the adjudication process provides a basis to describe the jury’s verdict as a judgment by the people.<sup>86</sup> This is in line with the ‘ideal of equality’ in the administration of justice mentioned by the Commission.<sup>87</sup>

---

<sup>83</sup> Delvin, above n 65, 164 quoted in *AK v The State of Western Australia* (2008) 232 CLR 438, 470 [90] (Heydon J).

<sup>84</sup> *Ibid*; see also *AK v The State of Western Australia* (2008) 232 CLR 438, 472–473 [93]–[97] (Heydon J).

<sup>85</sup> Ainslie Van Onselen and Tim Wilson, *The Sunday Debate: Are Juries a Waste of Time?* (28 August 2011) *The Sunday Telegraph* <<http://www.ipa.org.au/news/2461>>.

<sup>86</sup> Roderick Munday ‘Jury Trial, Continental Style’ (1993) *Legal Studies* 204, 208 (in France this notion has been embraced as an essential feature of the jury trial).

<sup>87</sup> Law Reform Commission of WA, above n 13, 11.

## 2 Disadvantages

Several criticisms have been levelled against the jury trial by critics of this institution. In *AK v WA*, Heydon J commented as follows on the ability of jurors to assess evidence:

It may certainly be accepted that there are ‘irrational’ aspects of trial by jury in criminal cases. The selection of 12 as the number of jurors has never been satisfactorily explained. Jurors are expected to understand, remember – on occasions for months – and weigh evidence, which is sometimes not given clearly or is complicated in character, often without ever having done this before. They are expected to grasp and apply sometimes complex propositions of law, almost always without prior experience of or training in this activity. Many jurors were and are ‘unaccustomed to severe intellectual exercise or to protracted thought’.<sup>88</sup>

Malcolm J McCusker QC, an eminent Western Australian barrister and former State Governor, appears to be one of the most outspoken critics of the jury trial. In a celebrated paper he argued as follows:

In this day and age there is a demand for what is popularly called ‘transparency’. Yet the deliberations of juries, and their reasons for a verdict, are shrouded in total secrecy. Not only do juries not give reasons, but they are not permitted to do so. Hence, to appeal against a jury’s verdict is extremely difficult. I am not for a moment suggesting that juries should give reasons for their decisions. That would be impracticable. The only way of achieving ‘transparency’ is for all trials to be by Judge alone, possibly sitting with an assessor or assessors to assist the Judge in cases which may involve complex issues of a scientific or commercial nature, or perhaps by 3 Judges, each writing,

---

<sup>88</sup> *AK v The State of Western Australia* (2008) 232 CLR 438, 471 [91] (Heydon J) quoting *The Second Report of HM Commissioners for Inquiring into the Process, Practice, and System Pleading in the Superior Courts of Common Law*, Parliamentary Papers 1853 [1626] vol 40, 6.

without conferral, separate decisions, as Richard Dawkins has suggested.<sup>89</sup>

McCusker also lifted the veil shrouding the jury room by referring to what he called ‘some jury horror stories’.<sup>90</sup> These are stories of some jurors afterwards relating their experiences to others. McCusker remarked:

I have been told a number [of stories], by people who have served on juries and had been thoroughly disillusioned with the process. A not uncommon complaint is that some jurors are simply not interested, lose attention (if they had it at all) after a short time and therefore do not absorb the evidence. One juror told me that he sometimes diverted himself during the trial by watching how some of his fellow jurors struggled to stay awake and look attentive.<sup>91</sup>

Greg Barns, a barrister and spokesman for the Australian Lawyers Alliance, echoed these sentiments. He said:

McCusker makes a valid point. Is it right that in the 21st century we allow the liberty of a person and the course of their future life and that of their families to be determined by 12 lay people who deliberate in secret and upon whom we rely to obey a judge’s instructions, particularly about leaving their prejudices at the court house door and not resorting to the internet but only focussing on the evidence before them?<sup>92</sup>

---

<sup>89</sup> Malcolm McCusker, ‘Bad Press: Does the Jury Deserve It?’ (Paper presented at the 36<sup>th</sup> *Australian Legal Convention*, 18 September 2009) 1, 8.

<sup>90</sup> *Ibid* 5.

<sup>91</sup> McCusker, above n 86, 5. Apparently ss 56A and 56B of the *Juries Act 1957* and a trial judge’s duty to warn the jury, before discharging them, not to disclose their deliberations did not prevent these stories from emerging.

<sup>92</sup> Greg Barns, *Simon Gittany and the Case for Judge-only Trials* (28 November 2013) ABC News <<http://www.abc.net.au/news/2013-11-28>>.

Barns added that the Australian legal profession, and even some in academia, place a lot of faith in the jury system. However, he argued that this should not prevent a proper discussion in the relevant fora on ‘whether or not judge’s (sic) hearing the evidence and deliberating on criminal charges is a more preferable route to follow if we want to ensure greater transparency in the justice system’.<sup>93</sup>

Ainslie van Onselen, a law partner and legal affairs writer, argued against this mode of trial in the debate with Tim Wilson.<sup>94</sup> Van Onselen also alluded to the ‘jury stories’:

Ask anyone who has sat on a jury trial and you will hear spine-chilling stories: jury members changing their minds at the eleventh hour because they want to get home for the weekend; assumptions of guilt due to race or other prejudice; duress from members of the jury panel or prohibited nocturnal visits to crime scenes to find out what really happened.<sup>95</sup>

She added that:

[T]he primary tenet of the argument against jury trial is the lack of transparency... no written reasons are given, the decision is deliberated upon in private and no one (including the presiding judge) knows what happened behind closed doors.<sup>96</sup>

Van Onselen aligned herself with the other critics by saying that the ‘alternative to jury trials is to have cases determined by a single judge or a panel of three judges... written reasons would be provided, enabling decisions to be appealed with more clarity and improving transparency in the process’.<sup>97</sup>

There would be something amiss in a discussion on the advantages and disadvantages of the jury trial if no mention was made of

---

<sup>93</sup> Ibid.

<sup>94</sup> Van Onselen and Wilson, above n 82.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

miscarriages of justice that occurred as a result of juries going astray and convicting innocent people. Bernie Matthews showed that Australia has had its fair share of such miscarriages of justice.<sup>98</sup> He referred to six cases in this regard, including the notorious case of *Chamberlain v R (No 2)*.<sup>99</sup> In 1982, Lindy Chamberlain was tried by a jury in the Supreme Court of the Northern Territory for the murder of her baby Azaria, despite the fact that the Crown could not show the slightest motive on her part. The Crown's case was also riddled with improbabilities and the reliability of its forensic and scientific evidence was questionable. The accused consistently maintained that a dingo had taken her baby and her version was supported by several witnesses at the scene. Despite this, the accused was convicted by the jury.

The accused's appeal to the Federal Court was unanimously dismissed and her subsequent appeal to the High Court failed by a majority of three to two. In 1986, Azaria's matinee jacket was discovered at Uluru (also known as Ayers Rock), which sparked a string of events that unfolded over the next 26 years. It took a Royal Commission, a statute enabling the Supreme Court NT to adopt the findings of the Commission and quash the accused's conviction and a fourth coroner's inquest, declaring on 12 June 2012 that a dingo had taken the baby, to rectify the jury's blunder.<sup>100</sup>

In the author's view the jurors were blinded by the forensic and scientific evidence and ignored the evidence of several witnesses at the scene who corroborated the accused's version. Further, neither the full bench of the Federal Court nor three judges of the High Court could find any justification to set aside the jury's verdict. Only the two remaining High Court judges, Murphy and Deane JJ, were of the

---

<sup>98</sup> Bernie Matthews, 'Australian Miscarriages of Justice' (2004) 10(1) *The National Legal Eagle*, art 6.

<sup>99</sup> (1984) 153 CLR 521.

<sup>100</sup> Sue Erikson, '4<sup>th</sup> Coronial Inquest' (2012) 37(3) *Alternative Law Journal* 207

<<https://www.altlj.org/news-and-views/downunderallover/duao-vol-37-3/411-4th-coronial-inquest>>.

view that the expert evidence supporting the conviction was unsafe and that the verdict should be set aside.<sup>101</sup>

In essence, the most compelling argument against the jury trial appears to be the absence of any reasons for the jury's verdict. It seems unfair to both the accused and the prosecution to be left in the dark. The community also has an interest in knowing why an accused was convicted or acquitted in a particular case. As critics have argued, this mode of adjudication goes against the public policy argument of transparency.<sup>102</sup> In addition, a jury's ability to decide complex matters involving scientific evidence or cases involving many witnesses and lengthy trials may also be questioned. Furthermore, the process of empanelment and the judge's explanations and directions from the outset until the conclusion of the trial must inevitably take up more time than what would be the case with a trial without a jury.<sup>103</sup> Finally, because of the courts' adherence to the principle that a conviction or acquittal must as far as possible be based on a jury's verdict, it often requires two, and sometimes even three or more, trials and appeals to finally dispose of a case. It is debatable whether such a result could be in the interests of justice.

### III TRIAL BY JUDGE ALONE

#### *A Provision for judge alone trial in Western Australia*

Since critics of the jury trial have suggested that a trial by judge alone would be a more efficient and transparent mode of adjudication, it is necessary to have a brief look at the legal position in this regard. Legislation in several different jurisdictions in Australia, including Queensland and WA, provides for a criminal trial by a judge alone.<sup>104</sup> The position in WA is regulated by s 118 of the *Criminal Procedure Act 2004* (WA). It is a rather lengthy provision dealing with many

---

<sup>101</sup> *Chamberlain v R (No 2)* (1984) 153 CLR 521, 576–577 (Murphy J), 630 (Deane J).

<sup>102</sup> See e.g., Barnes, above n 89.

<sup>103</sup> Colvin, above n 15, 758.

<sup>104</sup> Colvin, above n 15, 756.

different aspects. The starting position is that a criminal trial in the Supreme Court or District Court is conducted before a judge and jury. However, s 118 gives the judge a discretion, on application by the accused or the prosecution, to order that the trial be held before a judge alone.

The gist of s 118 may be summarised as follows, with the focus on the Supreme Court.

- i. An accused appearing in the Supreme Court or the prosecutor 'may apply to the court for an order that the trial ... be by a judge alone without a jury' (1).
- ii. 'Any such application must be made before the identity of the trial judge is known to the parties' (2).
- iii. The court may make such an order 'if it considers it is in the interests of justice to do so.... However, in the case of an application by the prosecutor the court 'must not do so unless the accused consents' (4).
- iv. Without limiting the previous subsection (4), 'the court may make the order if it considers – that the trial, due to its complexity or length or both, is likely to be unreasonably burdensome to a jury; or that it is likely that [offences] under *The Criminal Code* section 123 would be committed in respect of a member of the jury' (5).
- v. Without limiting the said previous subsection (4), 'the court may refuse to make the order if it considers the trial will involve a factual issue that requires the application of objective community standards such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness' (6).
  - a. (Subsection 7 deals with the case where the accused is charged with 2 or more charges and subsection 8 deals with the case where 2 or more accused are tried together.)

## B *Typical cases suitable for a judge alone trial and factors to be considered*

### 1 *Defence of insanity*

Paul Fairall states that there is a growing trend in Australia to opt for a judge alone trial in cases where the accused raises a defence of insanity.<sup>105</sup> He cites a number of cases to support his statement, including *The State of Western Australia v Brown* ('*WA v Brown*').<sup>106</sup> In this case, the accused, who was charged with two counts of murder, applied for an order under s 118 of the *Criminal Procedure Act 2004* (WA), directing a trial by judge alone without a jury. His defence was one of insanity, 'on the basis that he was at the time in such a state of mental impairment as to deprive him of the capacity to control his actions'.<sup>107</sup> The contended cause of the accused's alleged insanity was an adverse reaction to a certain drug he had taken.

The defence and prosecution each proposed to call a psychiatrist at the trial, but the two expert opinions differed on the effect the drug had on the accused. Jenkins J referred to the earlier case of *TVM v The State of Western Australia*,<sup>108</sup> in which McKechnie J stated:

A trial where the mental capacity of the accused is in question, especially where there is little dispute as to the facts, is often the subject of trial by judge alone. Where a case depends on a detailed consideration of scientific evidence, including DNA evidence, there is a trend towards trial by judge alone.<sup>109</sup>

---

<sup>105</sup> Paul A Fairall and Stanley Yeo, *Criminal Defences in Australia*, (LexisNexis Butterworths, 4<sup>th</sup> ed, 2005), chpt 13 [13.16].

<sup>106</sup> (2009) 195 A Crim R 527.

<sup>107</sup> *The State of Western Australia v Brown* [No 2] [2013] WASC 280, 284 [5] (Jenkins J).

<sup>108</sup> (2007) 180 A Crim R 183.

<sup>109</sup> *Ibid* 184 [6] (McKechnie J).

Having considered all the circumstances, Jenkins J concluded that it would be in the interests of justice for this case to be tried by a judge alone. Her Honour reasoned as follows:

[T]he case is likely to involve the finder of fact considering the effect of the accused's multi-drug and substance use, expert opinion regarding the interactions between those drugs and substances, differing expert psychiatric opinions about the accused's state of mind, having regard to his psychiatric history, drug and substance use and an involved factual background. Given the complexity of the issues in the trial, a trial by judge alone is more likely to result in a fair trial for the accused according to law.<sup>110</sup>

By virtue of their experience in assessing evidence and applying the law to the facts, judges are clearly better placed than jurors to adjudicate cases involving the mental state of an accused.<sup>111</sup> This is especially so where complex scientific evidence, which may involve conflicting opinions, usually needs to be assessed to make a factual finding.<sup>112</sup>

## 2 Adverse publicity

Another typical case for a judge alone trial is where the accused's arrest and impending trial have generated a lot of adverse media coverage, such that the defence believes it would make it impossible for the accused to get a fair trial before a jury.<sup>113</sup> A case in point is *Western Australia v Rayney* ('Rayney'),<sup>114</sup> in which Lloyd Rayney, a barrister charged with the murder of his wife, applied for a trial by judge alone. The application was based on the extent of media coverage that the case had generated which, according to the applicant, would have compromised the fairness of his trial.

---

<sup>110</sup> *The State of Western Australia v Brown* [2013] WASC 280, 286 [34] (Jenkins J).

<sup>111</sup> Cf *The State of Western Australia v Brown* [2013] WASC 280, 285 [29] (Jenkins J); see also *Lang v Western Australia* [2016] WASC 76.

<sup>112</sup> *Ibid.*

<sup>113</sup> Barns, above n 89.

<sup>114</sup> (2011) 42 WAR 383.

The applicant showed that the extent of media coverage relating to the case over a period of more than three years after the death of his wife was overwhelming. Reports on the death of the deceased, the investigations of the police and eventually the arrest and charging of Rayney saturated the media, especially the newspapers. What especially concerned the applicant was that a police officer involved in the investigation stated at a press conference about six weeks after the death of his wife, and just over three years before his arrest, that 'Mr Rayney was the prime and only suspect in the murder investigation of his wife'.<sup>115</sup>

This public announcement by the police was the gravamen of the argument for a judge alone trial. In the words of presiding Commissioner Sleight:

[T]he real prejudice created by the police announcement was that it heightened the media's and the public's interest in the case and spurred speculation and debate in the community as to Mr Rayney's guilt over a sustained period. The period of time between the naming of Mr Rayney as the prime suspect and him being charged (a period of over three years) has meant that the prejudice created against Mr Rayney is likely to have become well entrenched.<sup>116</sup>

The Commissioner concluded:

[T]he extent and nature of the pre-trial publicity has been exceptional. ... [This] publicity has created a community climate where there has been speculation about Mr Rayney's guilt and created an atmosphere of prejudice against Mr Rayney. There is a real potential that jurors will have formed strong pre-conceived ideas about his guilt prior to the trial. ... I believe that the best cure of the danger of [an unfair trial] is to order a trial by judge alone.<sup>117</sup>

---

<sup>115</sup> Ibid 394 [54] (Commissioner Sleight).

<sup>116</sup> Ibid 399 [88] (Commissioner Sleight).

<sup>117</sup> Ibid 399 [92] (Commissioner Sleight).

### *3 Factors to be considered in an application for a trial by judge alone*

The case of *Rayney* also provides insight into the factors that should be considered in an application for a trial by judge alone. It suffices to mention them briefly.

#### *(a) The subjective wish of the accused*

The accused cannot waive his or her ‘right to a jury trial’ because the relevant provision gives the court a discretion to order a trial by judge alone if it is considered to be in the interests of justice. However, the wish of the accused to be tried by a judge alone is a factor to be taken into account together with other factors, such as the interests of the community.<sup>118</sup>

#### *(b) Giving reasons*

There is some authority for the notion that the judge’s obligation to give reasons for the decision may, in a particular case, involving for example complex, technical evidence, be a consideration in favour of a trial by judge alone.<sup>119</sup>

#### *(c) Fairness of trial and pre-trial publicity*

Adverse pre-trial publicity in the media that generated a ‘public climate of hostility or prejudice’, creating a real risk of an unfair trial, is a recognised ground for ordering a trial by judge alone.<sup>120</sup>

#### *(d) Other factors*

---

<sup>118</sup> Ibid 389 [26] (Commissioner Sleight).

<sup>119</sup> Ibid 390 [27]–[29] (Commissioner Sleight) referring to *Arthurs v Western Australia* [2007] WASC 182, 195 [76] (Martin CJ).

<sup>120</sup> Ibid 390–391 [30]–[34] (Commissioner Sleight).

Under this heading the length of the trial may be a relevant consideration. Common sense dictates that a trial of extreme length may create real practical problems if it were to be by judge and jury. To assemble a sufficient number of jurors and to maintain the minimum number to give a verdict in the end may be a real challenge in such a case. The answer in this scenario may therefore be a trial by judge alone.<sup>121</sup>

### C Concluding note on judge alone trial

The main advantage of a trial by judge alone appears to be that a judge is required to give reasons for his or her judgment.<sup>122</sup> This complements the fairness of the trial and facilitates the appeal process. In addition, it may be argued that judges, because of their experience, may be better able than lay jurors to decide complex cases, involving scientific opinions or other complicated evidence.

Critics generally have proposed this mode of trial as a viable alternative to the jury trial but they have also alluded to the possibility of a judge sitting with one or two assessors.<sup>123</sup> The question may therefore be posed whether a trial by a judge and two legally-trained assessors would be a viable compromise between a jury trial on the one hand and a trial by judge alone on the other hand. The latter mode of trial would be free from the disadvantages attached to a jury trial and it would add two voices to the adjudicating process. Would the chances of a wrong factual finding or application of the law be less in the case where three legal minds decide the issues than in the case where a judge alone is tasked with this duty? This question will be considered in the next two parts.

---

<sup>121</sup> Ibid 392 [37] (Commissioner Sleight).

<sup>122</sup> *Criminal Procedure Act 2004* (WA) s 120; *AK v The State of Western Australia* (2008) 232 CLR 438, 453 [44] (Gummow and Hayne JJ), 470 [89] (Heydon J).

<sup>123</sup> Barns, above n 89.

#### IV TRIAL BY JUDGE AND ASSESSORS IN SOUTH AFRICA- A VIABLE ALTERNATIVE?

##### *A The history and nature of the South African legal system*<sup>124</sup>

For the purpose of this article, the adoption of the final Constitution in South Africa in 1996, which is the supreme law of the land to which all other law must conform, may be disregarded.<sup>125</sup> Apart from this constitutional dimension to the South African legal system, it has a hybrid character which 'is due to the respective influences of the Dutch, who governed the Cape from its founding in 1652 to the end of the eighteenth century, and the English, who ruled the Cape for most part of the nineteenth century.'<sup>126</sup> Substantive law owes its origin to the Roman Dutch law of the seventeenth century brought to the Cape by the Dutch, whereas procedural law in a broad sense is derived from the common law procedural model 'which was imported into the Cape by the English rulers during the early part of the nineteenth century'.<sup>127</sup>

The transformation of the procedural landscape comprised the introduction of a court structure and process in conformity with that

---

<sup>124</sup> On the historical development of the South African legal system after the English took control of the Cape; see generally H R Hahlo and Ellison Kahn, *The Union of South Africa: The Development of its Laws and Constitution* (Stevens & Sons Ltd, 1<sup>st</sup> ed, 1960) 205–218, 256–257; H R Hahlo and Ellison Kahn, *The South African Legal System and its Background* (Juta Legal and Academic Publishers, 2<sup>nd</sup> ed, 1968) chpt XVII; John Dugard, *Introduction to Criminal Procedure* (Juta Legal and Academic Publishers, 4<sup>th</sup> ed, 1977) chpt 1.

<sup>125</sup> The new constitutional dispensation, after the demise of Apartheid, was introduced by the *Constitution of the Republic of South Africa 1993* (South Africa) and given permanence by the *Constitution of the Republic of South Africa 1996* (South Africa).

<sup>126</sup> Wouter L De Vos, 'Developments in South African Civil Procedure over the Last Fifty Years' (2000) 3 *Stell Law Review* 343, 344.

<sup>127</sup> *Ibid.*

of the English courts at Westminster,<sup>128</sup> the adoption of the English law of evidence<sup>129</sup> and finally the incorporation of the jury trial, initially only in criminal cases but later also in civil cases.<sup>130</sup> Hahlo and Kahn described this metamorphosis in these words:

[T]he spirit of reform was abroad, and within a lustrum the legal institutions of the Cape had been transmogrified. The new order was to influence the legal structure of all future European settlement in Southern Africa.<sup>131</sup>

The civil jury was a dismal failure from the outset, due to reasons that need not be pursued here.<sup>132</sup> It was abolished in 1927 in the Cape and Natal where it was still recognised. Hahlo and Kahn remarked aptly: ‘[t]hey [civil juries] passed unwept, unhonoured and unsung’.<sup>133</sup> The jury trial in criminal cases had a longer lifespan, lasting until 1969. But it was not a case of ‘sudden death’. Over a period of time this mode of trial was gradually phased out to make way for a trial by judge and two assessors. Legislation aided this process.<sup>134</sup> The

---

<sup>128</sup> A Supreme Court with English oriented procedures was established by the First Charter of Justice of 1827, followed by the Second Charter of Justice of 1834; Hahlo and Kahn, above n 123, 205–06.

<sup>129</sup> Evidence Ordinance 72 of 1830 cited by H R Hahlo and Ellison Kahn, *The Union of South Africa: The Development of its Laws and Constitution* (Stevens & Sons Ltd, 1<sup>st</sup> ed, 1960) 207.

<sup>130</sup> Ordinance 84 of 1831 and Act 7 of 1854 respectively cited by H R Hahlo and Ellison Kahn, *The Union of South Africa: The Development of its Laws and Constitution* (Stevens & Sons Ltd, 1<sup>st</sup> ed, 1960) 213–214.

<sup>131</sup> H R Hahlo and Ellison Kahn, *The Union of South Africa: The Development of its Laws and Constitution* (Stevens & Sons Ltd, 1<sup>st</sup> ed, 1960) 205.

<sup>132</sup> *Ibid* 215 mentioning ‘bias, prejudices and emotions [that] took command’.

<sup>133</sup> *Ibid* 257.

<sup>134</sup> On the jury trial in South Africa, see Schwikkard and Van der Merwe, above n 6; S A Strauss, ‘The Jury in South Africa’ (1973) 11 *University of Western Australia Law Review* 133; JJ Joubert, *Criminal Procedure Handbook* (Juta Legal and Academic Publishers, 11<sup>th</sup> ed, 2014) chpt 13 [2.4]; South African Law Commission, ‘Simplification of Criminal

*Criminal Procedure and Evidence Act 1917*<sup>135</sup> retained the rule that all criminal cases in the Supreme Court were to be tried before a judge and jury, but it also provided that an accused could demand a trial without a jury. In such an event, the judge had a discretion to call up two assessors to assist the court in an advisory capacity on the facts.<sup>136</sup>

In 1935, the Minister of Justice was authorised to issue an order directing a trial to be held without a jury in the case of certain crimes.<sup>137</sup> It was further provided that in cases where the crime charged was treason, murder, rape or sedition, or where the Minister ordered a trial without a jury, the judge was obliged to call up two assessors to assist the court. The assessors had to have experience in the administration of justice or skill in a matter relevant to the trial and they became full members of the court on all factual issues.<sup>138</sup> The power of the Minister to order a trial without a jury gradually increased from 1948 onwards. In 1954, Parliament passed an Act providing that all trials would be without a jury, except where the accused exercised his right to a jury trial.<sup>139</sup> This exception did not apply if the Minister ordered a trial without a jury.

A trial by judge and assessors then became the norm. In 1959, the obligation on the judge to summon two assessors in certain cases was removed and ‘it became a matter entirely within the discretion of the judge’.<sup>140</sup> The trend away from the jury trial continued, and towards the end of the 1960’s, it became a rarity. Strauss remarked that by that time ‘it had become impracticable to maintain the rather cumbersome procedure necessary for the occasional jury trial which still took

---

Procedure’ (Issue Paper No 6, South African Law Commission, 30 June 1997) 15–19.

<sup>135</sup> *Criminal Procedure and Evidence Act 1917* (South Africa).

<sup>136</sup> *Ibid* s 216 (The assessors had to hold certain offices, *inter alia* that of magistrate or justice of the peace); Strauss, above n 134.

<sup>137</sup> *Inter alia* offences of a political nature, offences relating to illicit dealing in diamonds and offences against a person of another race– s 36 Act 46 of 1935 cited by Strauss, above n 131, 136.

<sup>138</sup> Strauss, above n 131, 137.

<sup>139</sup> Section 1 Act 21 of 1954 cited by Strauss, above n 134, 137.

<sup>140</sup> Strauss, above n 131, 138.

place'.<sup>141</sup> The death-knell of the criminal jury, which was accomplished by the *Abolition of Juries Act 34* of 1969, certainly came as no surprise to all concerned.

A number of reasons have been advanced for the gradual decline and final abolition of the jury trial in South Africa. The South African Law Commission have mentioned the following:

1. The wide powers of the Minister of Justice to order trials without a jury, which accelerated its decline;
2. Extreme reluctance of members of the public to serve on the jury, using various excuses not to serve as jurors;
3. Large number of exemptions leaving few competent persons to serve as jurors; and
4. 'Fears of racial prejudice among jury members, given South Africa's complex race relations'.<sup>142</sup>

### B *Present-day legislative framework*

The present position in the High Court (formerly named Supreme Court) is regulated by s 145 of the *Criminal Procedure Act 51* of 1977, as amended. It is a lengthy section and only the essence of the provision will be extracted here. Under the heading 'trial in superior court by judge sitting with or without assessors' it provides as follows:

1. (a) [A]n accused arraigned before a superior court shall be tried by a judge of that court sitting with or without assessors. ....
2. (b) An assessor... means a person who, in the opinion of the judge who presides at the trial, has experience in the

---

<sup>141</sup> Ibid.

<sup>142</sup> Corey Adwar *Here's Why Nobody in South Africa Gets a Jury Trial including Oscar Pistorius* (4 April 2014) Business Insider, <<http://www.businessinsider.com.au>>; South African Law Commission, above n 134, 17–18.

administration of justice or skill in any matter which may be considered at the trial.

3. Where [a director of public prosecutions] arraigns an accused before a superior court— (a) for trial and the accused pleads not guilty; or (b) for sentence, or for trial and the accused pleads guilty, and a plea of not guilty is entered at the direction of the presiding judge, - the presiding judge may summon not more than two assessors to assist him at the trial.
4. No assessor shall hear any evidence unless he first takes an oath or, as the case may be, makes an affirmation, administered by the presiding judge, that he will, on the evidence placed before him, give a true verdict upon the issues to be tried.
5. An assessor who takes an oath or makes an affirmation ... shall be a member of the court: Provided that ...

(Provision is made in a lengthy proviso that the finding of the majority of the court on any question of fact, including the admissibility of admissions and confessions, shall be the decision of the court. However, if the judge is of the opinion that it would be in the interests of justice that the assessors *do not take part* in the decision on the *admissibility of an admission or confession* the judge alone shall decide that issue. If the judge sits with only one assessor and there is a difference of opinion on any question of fact the finding of the judge shall be the decision of the court. Finally, the judge alone shall decide any other question of law, meaning other than the admissibility of admissions and confessions, as well as the question whether any matter constitutes a question of law or a question of fact.)<sup>143</sup>

6. (This subsection deals with the compensation of assessors.)

---

<sup>143</sup> Note that this section was adopted at a time when gender issues were not as prominent as today— hence the pronouns are couched only in male format. In present-day South Africa legislation and court decisions are all couched in gender sensitive terms.

Two other sections of the *Criminal Procedure Act* may also be briefly mentioned. Section 146 deals with the requirement that a court must give reasons for its decision. If it is a decision on a question of law, the judge alone must make a decision and provide reasons for his or her finding. Note that, although the admissibility of admissions and confessions is a question of law, the assessors may take part in that. In such an event, the judge must also give reasons for the court's finding. If it is a decision on a question of fact, whether or not the judge sits with assessors, he or she must record reasons for the finding. In the event where the judge sits with one or more assessors and there is a difference of opinion on a question of fact or the admissibility of an admission or confession, the judge must also give the reasons for the finding of the member who is in the minority.

Section 147 governs the case of the death or incapacity of an assessor. It provides:

If an assessor dies or, in the opinion of the presiding judge, becomes unable to act as assessor at any time during a trial, the presiding judge may direct – (a) that the trial proceed before the remaining member or members of the court; or (b) that the trial start *de novo*, and for that purpose summon an assessor in the place of the assessor who has died or has become unable to act as assessor. [In the latter event] the plea already recorded shall stand.<sup>144</sup>

### C *Qualifications of assessors and candidates likely to be summoned*

The Act does not require any formal qualifications or that an assessor must hold a certain office. It merely requires an assessor to have 'experience in the administration of justice or skill in any matter which may be considered at the trial'.<sup>145</sup> A specific skill clearly includes professions other than the legal profession, such as

---

<sup>144</sup> *Criminal Procedure Act 1977* (South Africa) s 147.

<sup>145</sup> *Ibid* s 145(1)(b).

accountants and auditors.<sup>146</sup> However, in practice it rarely happens that members of other professions are called up as assessors.<sup>147</sup> ‘Experience in the administration of justice’ is clearly a wide concept that would include persons without a formal legal qualification but in practice, the calling up of assessors has been confined to legally-qualified people, namely advocates (barristers), attorneys (solicitors), retired magistrates and legal academics.<sup>148</sup> Assessors falling within this category are regularly summoned to assist judges in the High Court of South Africa.

#### D *In what circumstances should a judge summon assessors?*

The *Criminal Procedure Act* clearly leaves it entirely to the discretion of the judge whether assessors are to be summoned or not. Prior to 1995, when the death penalty was still a legally valid sentencing option in extreme cases, where there were no extenuating circumstances, judges were obliged to call up two assessors if they were of the opinion that the death penalty might be imposed.<sup>149</sup> Since judges did not have any knowledge of the State’s case prior to the trial, except what they could glean from the summary of the salient facts accompanying the indictment, they had to rely to some extent on the recommendations of prosecuting counsel in this regard.<sup>150</sup>

In *S v Makwanyana and Anor*<sup>151</sup> the death penalty was declared unconstitutional and therefore invalid, which led to it being removed from the *Criminal Procedure Act*. Henceforth, life imprisonment became the most drastic form of punishment.<sup>152</sup> Since the regional courts’ jurisdiction has been drastically increased over the years, only serious crimes of a truly grievous nature are generally prosecuted in

---

<sup>146</sup> Steph van der Merwe (ed), *Commentary on the Criminal Procedure Act* (Juta Legal and Academic Publishers, 1<sup>st</sup> ed, 1987) 21–4.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid 21–5.

<sup>150</sup> Joubert, above n 131, chpt 13 [2.2].

<sup>151</sup> [1995] (3) SA 391 (Constitutional Court).

<sup>152</sup> *Criminal Procedure Act 51 1977* (South Africa) s 276.

the High Court.<sup>153</sup> Upon conviction, such crimes call for lengthy terms of imprisonment, which makes it prudent for judges to summon assessors to assist the court.<sup>154</sup>

### E *Functions of assessors*

Section 145 makes it clear that assessors are full members of the court regarding all questions of fact. The same applies to questions involving the admissibility of admissions and confessions, provided the judge did not exercise his or her discretion in the interests of justice to exclude the assessors from deciding the latter issue.<sup>155</sup> Since the practice is to summon legally-trained assessors to assist the judge, there would usually not be any reason to exclude the assessors from deciding this issue.<sup>156</sup> As assessors are full members of the court, it follows that where there is a difference of opinion between them and the judge on any of the stated issues, their decision shall be the finding of the court.<sup>157</sup>

Upon conclusion of a trial, the judge and assessors retire to the judge's chambers and deliberate together on the guilt of the accused. Needless to say, if one assessor disagrees with the judge and the other assessor, the latter two's decision would prevail. Where the judge sits with only one assessor and there is disagreement among them, the judge's decision would then be the finding of the court.<sup>158</sup> Strictly speaking, assessors are not allowed to take part in the court's decision regarding the sentence to be imposed upon conviction of the accused. The provision clearly does not sanction such a function on their part. However, assessors remain part of the proceedings until a sentence has been imposed and it happens regularly that judges consult with

---

<sup>153</sup> Magistrates Courts Act 32 of 1944 s 89 (These Courts have jurisdiction over all offences except treason).

<sup>154</sup> Van der Merwe, above n 143, 21–5.

<sup>155</sup> Ibid; *Criminal Procedure Act 1977* (South Africa) s 145(4)(b).

<sup>156</sup> See the remarks in *S v Post* [2001] (1) SALR 326 (W) 333 (Cameron J); Van der Merwe, above n 143, 21–6; Joubert, above n 131, 226.

<sup>157</sup> Van Merwe, above n 143, 21–5.

<sup>158</sup> *Criminal Procedure Act 1977* (South Africa) s 145(4)(a).

their assessors as to what would be a suitable punishment.<sup>159</sup> In *S v Botha*<sup>160</sup> the Supreme Court of Appeal found that it was not irregular for the judge to consult with the assessors on an appropriate sentence.

#### F Incapacity of an assessor

The presiding judge may discharge an assessor from duty if, in the words of s 147(1) of the *Criminal Procedure Act*, the assessor ‘becomes unable to act as assessor... during a trial’.<sup>161</sup> In *S v Malindi* (*‘Malindi’*).<sup>162</sup> the crucial word ‘unable’ was interpreted to convey:

[A]n actual inability to perform the function of acting as an assessor [which] could derive from an inherent physical or mental condition or possibly also a situation which physically prevented the assessor from attending the trial, such as ... indefinite detention here or in a foreign country.<sup>163</sup>

The court added that the word ‘unable’ is therefore inappropriate to describe ‘the situation where an assessor becomes legally incompetent to continue to act in a case’ because of circumstances that warrant his or her recusal.<sup>164</sup>

The recusal of a judge or an assessor under the common law may be raised where it appears that the judge or assessor has an interest in the case or where there is a reasonable belief, viewed through the eyes of a reasonable litigant, that there is a likelihood of bias on the part of the judge or assessor.<sup>165</sup> Recusal of a judge or assessor is a proceeding in open court, whether one of the parties requests it or the judge acts *mero motu*, and the parties should be afforded the opportunity to be heard on the issue.<sup>166</sup> The same principle applies where a judge

---

<sup>159</sup> Van der Merwe, above n 143, 21–6.

<sup>160</sup> (2006) (2) SACR 110 (SCA); 2006 (2) SACR 110 (SCA); *Commentary* 21–6.

<sup>161</sup> *Ibid.*

<sup>162</sup> [1989] ZASCA 175.

<sup>163</sup> *Ibid* 192 (Corbett CJ).

<sup>164</sup> *Ibid* 192 (Corbett CJ).

<sup>165</sup> *Ibid*; Van der Merwe, above n 143, 21–6.

<sup>166</sup> *S v Malindi* [1989] ZASCA 175, 195 (Corbett CJ).

considers, in terms of s 147(1), whether an assessor should be discharged from duty on the ground of a physical or mental inability, meaning the parties should be heard.<sup>167</sup> In *Malindi*, the presiding judge purported to act under this provision by finding that one of the assessors had become unable to act as assessor, directing his recusal and ordering the trial to proceed with only the judge and the remaining assessor.<sup>168</sup>

The judge gave this order in open court but without the agreement of the assessor concerned and without hearing counsel for the defence and the State on the issue. However, this was not a case of physical or mental inability on the part of the assessor. It was a politically-fuelled trial in which the accused were charged with treason; they were involved in activities attempting to make the country ungovernable and to overthrow the government by violence. Part of the State's case was that the accused belonged to an organisation involved in a campaign to obtain a million signatures on a declaration denouncing the government's apartheid policies.

When the trial had been in progress for seventeen months, the trial judge learnt that one of the assessors had signed the declaration. This perturbed the judge and prompted him to give the order mentioned. The former Appellate Division of the Supreme Court (now Supreme Court of Appeal) found that the trial judge had wrongly construed s 147(1) for the reasons stated above and that following the discharge of the assessor concerned, the court was not properly constituted. It was further found that it was highly irregular for the trial judge to give these orders without hearing the parties. Consequently, the convictions and sentences were set aside.<sup>169</sup>

### G Evaluation

---

<sup>167</sup> Ibid 192 (Corbett CJ).

<sup>168</sup> Ibid 205 (Corbett CJ).

<sup>169</sup> *S v Malindi* [1989] ZASCA 175, 217, 226 (Corbett CJ).

Although there has been some speculation from time to time on whether the jury system should be reintroduced in South Africa,<sup>170</sup> there is presently no serious debate on this issue. The trial by judge and assessors has become entrenched in the South African criminal justice system and, in the author's view, it is there to stay. The present Chief Justice of South Africa, Mogoeng Mogoeng, recently made the following remarks at the law school of the University of KwaZulu-Natal in Durban:

Trial by jury is not suitable for South Africa and would simply clog up the legal system. [T]he wide discrepancies in education between various South Africans would be problematic when using juries. It would complicate the system. I'm against it because it's time consuming and it is not suited to our country.<sup>171</sup>

The decision of a judge sitting with assessors is not a verdict of the accused's peers or the voice of the people but it is the finding of a court consisting of a judge, appointed by way of a proper constitutional process, and two legally-trained assessors, thus resting on the consensus of three legal minds. Needless to say, judges and assessors are fallible and they may sometimes err in their factual findings. However, since the court must give reasons for its decision, the defence would have the advantage of the court's judgment to identify grounds for an appeal. The court of appeal would also be able to focus on the judgment to consider if the trial court erred in its findings.

If the prosecution wishes to appeal against the trial court's decision, such an appeal would be confined to questions of law.<sup>172</sup> This is what happened in the celebrated case of *Director of Public Prosecutions, Gauteng v Oscar Pistorius*<sup>173</sup> in which the Supreme Court of Appeal found that the trial judge had applied the test for the form of intent known as *dolus eventualis* incorrectly and that the conviction of

---

<sup>170</sup> Joubert, above n 131, chpt 13 [2.4].

<sup>171</sup> *Trial by Jury not Suitable for South Africa* (11 October 2012) Law Practice <<http://www.bizcommunity.com>>.

<sup>172</sup> *Criminal Procedure Act 1977* (South Africa) s 319.

<sup>173</sup> [2015] ZASCA 204.

culpable homicide (manslaughter) had to be replaced by one of murder.<sup>174</sup>

## V CONCLUSION

It is submitted that the disadvantages attached to the jury trial significantly outweigh the advantages. The crucial shortcoming of this mode of trial is the absence of any reasons for the jury's verdict. In the modern era of transparency, this aspect is at odds with present-day notions regarding the fairness of the proceedings. Over and above the lack of reasons, there are sufficient indications showing that trial by jury is not an efficient method of finding the facts. In the words of the Law Reform Commission of WA, 'the efficiency of the jury as a tribunal of fact may be questionable'.<sup>175</sup> Furthermore, apart from the whole infrastructure needed to sustain the jury system, such as the selection and empanelment of the jurors, the trial itself is cumbersome, time-consuming and costly.

Although trial by jury is still the norm in WA, cases tried by judges sitting alone have become regular occurrences in this state.<sup>176</sup> It would not be such a drastic departure from the existing trial by judge alone in certain cases to bring in two legally trained assessors to assist the judge in the task of fact-finding. The advantage would be that, instead of one legal mind considering the issues, there would then be three performing this function. It should be borne in mind that an accused charged with a serious crime in the Supreme Court, such as murder,

---

<sup>174</sup> Ibid 235 [58] (Mpati P, Mhlantla, Leach, Majiedt JJA and Baartman AJA).

<sup>175</sup> Law Reform Commission of Western Australia, above n 13. The Commission did qualify this phrase by saying that 'the public confidence in the administration of justice that is engendered by the mere existence of the jury system is invaluable'.

<sup>176</sup> Cf the recent case of *Lang v Western Australia* [2016] WASC 76, 82 [9] (Hall J); see further *TVM v Western Australia* [2007] WASC 299; *Hone v Western Australia* [2007] WASCA 283; *Western Australia v Brown (No 2)* [2013] WASC 280; and *Chiha v Western Australia (No 2)* [2015] WASC 147.

runs the risk of life imprisonment upon conviction.<sup>177</sup> Such a serious consequence calls for the best trial mechanism to ensure, as far as humanly possible, a correct finding regarding the guilt of the accused.

It could be argued that the appeal process could address mistakes made by a judge in a judge alone trial. However, a mode of trial that could offer a greater chance of a correct finding in first instance would improve the quality of the criminal justice system. It is submitted that a trial by judge and legally trained assessors constitutes a viable option to consider in this regard. In the case of such a trial, the judge would still decide all issues relating to the admissibility of evidence but with regard to the assessment of evidence, the judge and assessors would need to take into account the relevant rules governing this part of the proceedings.<sup>178</sup> Instead of giving an appropriate direction or warning to the jury, they would 'admonish' themselves to take the relevant rule into account in assessing the totality of the evidence.

For example, if certain relevant facts are within the knowledge of the accused only and he or she elects to remain silent in the face of a *prima facie* case established by the prosecution, the judge and assessors would have to take due note of the effect of such action by the accused. In the case of a jury trial, these circumstances would call for a *Weissensteiner* direction, requiring the judge to warn the jury that the accused's silence cannot fill any gaps in the State's case or be

---

<sup>177</sup> Colvin, above n 15, 880.

<sup>178</sup> Since most of the exclusionary rules owe their origin to the jury it could be argued that the abolition of the jury could pave the way for a more liberal and flexible approach to the admissibility of evidence, which would normally be excluded in a jury trial. The ratio underlying this argument is that judges and assessors are legally trained and thus able to assess the evidence, whatever its nature, for what it is worth. The reform of the hearsay rule in South Africa by s 3 of the Evidence Amendment Act 45 of 1988 serves as an illustration of such an approach. The Act relaxed the rigidity of the common law by conferring a discretion on the judge to admit hearsay evidence, in both civil and criminal proceedings, if its admission would be in the interests of justice. See Schwikkard and Van der Merwe, above n 1, 5–6, 274–84. This issue, which would likely evoke serious controversy, falls outside the ambit of this paper.

taken as an admission. However the jury must also be instructed that they can take the absence of an explanation from the accused into account for purposes of evaluating the evidence.<sup>179</sup> Thus, if the prosecution has established its case against the accused and the latter remains silent, the jury could more safely draw an inference of guilt.<sup>180</sup> On the other hand, in the case of a trial by judge and assessors, the judge and assessors would take this rule into account for purposes of assessing the evidence.

The change from the present system of allowing certain cases to be tried by a judge sitting alone to a structure involving a judge assisted by two assessors adjudicating such cases could turn out to be a relatively easy transition. Legislation would of course have to be adopted to provide for two assessors to assist the judge, but in the author's view it would not involve major legislative reform. It is also suggested that such change would not be so far removed from the present judge alone trials that it could not be accommodated in WA's legal culture.

However, to abolish the jury system altogether and to replace it with a trial by a judge and two assessors in all cases in the Supreme Court would constitute a drastic break with the past, requiring comprehensive statutory reform. It is nevertheless argued that this is a viable alternative, promising a more efficient method of fact-finding and a streamlined trial process, which would save time and cost. However, the author realises that the jury trial is firmly embedded in WA's criminal justice system and regarded by many as an invaluable part of its legal heritage. The proposed change could only occur if there were to be a major shift in the minds of all concerned, meaning the legal fraternity, politicians and the community. That could only happen if the value of the jury in the present-day system were subjected to a debate involving all stakeholders. The author expresses the hope that this paper could make a contribution to such a debate.

---

<sup>179</sup> This rule was laid down in *Weissensteiner v R* (1993) 178 CLR 217, 224–25 [33]–[34] (Mason CJ, Deane and Dawson JJ).

<sup>180</sup> *Ibid.*

# Comments

## THE IMPORTANCE OF COMITY AS A BACKBONE TO PRIVATE INTERNATIONAL LAW

TRACY ALBIN\*

### Abstract

*Foreign State Immunity – Registration of Judgments – Comity – Enforcement of Judgments – Commercial transactions – Commercial property – Foreign assets*

*Foreign State immunity legislation in Australia may lead to the unenforceability of foreign judgments by judgment debtors. This case note considers the recent case of *Firebird Global Master Fund II Ltd v Republic of Nauru and Others*<sup>1</sup> ('Firebird'). In particular, it discusses the the High Court of Australia's application of the *Foreign State Immunities Act 1985 (Cth)* ('Immunities Act') to proceedings concerning registration of a judgment of a foreign State. This comment will also consider, inter alia, the proper construction to be given to the exemption in relation to 'commercial transactions' found in s 11(1) of the *Immunities Act*.*

### I INTRODUCTION

*Firebird* presents a decision of commercial significance for foreign creditors seeking to register and enforce judgments in Australia. The High Court offered a fresh interpretation of s 9 and 11(1) of the *Immunities Act* whilst stressing the importance that creditors, when seeking to enforce a judgment against assets held in Australia, must ensure the assets are not used for substantially commercial purposes. The decision is also important in an international context as it highlights Australia's position in the shift from absolute to restrictive

---

\* Law Student (LLB) (Hons) at Curtin University of Technology.

<sup>1</sup> *Firebird Global Master Fund II Ltd v Republic of Nauru and Others* (2015) 90 ALJR 228.

immunity, in line with other international players. The approach of the High Court, and the reasons for their decision discussed below, demonstrate the importance of international law when deciding cases within Australia involving foreign parties. The *Firebird* litigation also identifies the importance of the need for comity in international law areas and the role that States play in achieving this.

## II FACTS

The appellant, Firebird Global Master Fund II Ltd ('FGM'), held bonds issued by the Republic of Nauru Finance Corporation ('RONFIN'). Upon default of the bond issuer, and the Republic of Nauru as guarantor (the second respondent) ('Nauru'), Firebird obtained a judgment in the Tokyo District Court on 28 October 2011 for 1.3 million Yen including interest and costs against Nauru. On 6 June 2012 Firebird obtained orders in the New South Wales ('NSW') Supreme Court for the registration of the foreign judgment under pt II of the *Foreign Judgments Act 1991* (Cth) ('*Foreign Judgments Act*').

Further orders were made granting leave to serve the notice of registration to the Secretary for Justice of the Republic of Nauru pursuant to s 24(1) of the *Immunities Act*. Nauru had 14 days to apply to have the registration set aside. On 10 September 2014, after the 14 days had expired, Firebird obtained a garnishee order against the Westpac Banking Corporation ('Westpac') with which Nauru held thirty accounts. On 19 September 2014, Nauru sought a stay of the garnishee order. On 25 September 2014, Nauru applied to have the registration of the judgment and the garnishee order set aside, claiming immunity under the *Immunities Act*.

## III RELEVANT LEGISLATION

### *A The Immunities Act*

The *Immunities Act* was implemented subsequent to a recommendation by an Australian Law Reform Commission report which identified the reduction in scope of foreign state immunity in other jurisdictions. The report recommended that Australia legislate

to follow this trend.<sup>2</sup> The *Immunities Act* provides immunity to foreign States against the jurisdiction of Australian courts in any proceedings, except in those circumstances provided for in s 9.<sup>3</sup> An example of this is seen in s 11(1) which grants an exception to immunity for proceedings concerning ‘commercial transactions’.

Section 32(3) provides that foreign State property cannot be the subject of any process or order of an Australian court unless it can be defined as ‘commercial property’. Section 27(1) requires that a default judgment of appearance shall not be made against a foreign State unless it can be proved that the service of the initiating process has been given in accordance with the Act.<sup>4</sup> Section 24(1) of the Act allows for the initiating process to be served to the Attorney General of the serving State for delivery to the equivalent organ of the foreign State.

### B *Foreign Judgments Act*

The *Foreign Judgments Act* governs, *inter alia*, the registration and enforcement of foreign judgments in Australia.<sup>5</sup> Where a foreign judgment is registered, it has the same effect as if it were given in the registering court originally.<sup>6</sup> A party may apply to have the registration of the judgment set aside under the Act pursuant to s 7(1).<sup>7</sup> The relevant ground for setting aside the judgment in these proceedings can be found in s 7(2)(a)(iv) which applies when it is determined that the original court did not have jurisdiction to hear the matter. Section 7(4)(c) provides that the original court will not have

---

<sup>2</sup> Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) [78]-[79].

<sup>3</sup> *Foreign State Immunities Act 1985* (Cth) s 9.

<sup>4</sup> *Foreign State Immunities Act 1985* (Cth) s 27(1); the relevant provision to be complied with here was s 24(1) which required Firebird to supply the initiating writ to the Attorney General to be delivered to the equivalent organ in Nauru.

<sup>5</sup> *Foreign Judgments Act 1991* (Cth) s 6(1).

<sup>6</sup> *Ibid* s 6(7).

<sup>7</sup> *Ibid* s 7(1).

jurisdiction where the judgment debtor was entitled to immunity under the *Immunities Act* and did not submit to the jurisdiction of the original court.

#### IV PROCEDURAL HISTORY

##### *A The NSW Supreme Court*

On 3 October 2014, Young AJA in the NSW Supreme Court set aside the registration of the Tokyo judgment and the garnishee order against Nauru's bank accounts.<sup>8</sup> The Court held that the proceedings for registration of a foreign judgment *do* come within s 9 of the *Immunities Act* and that s 11(1) did not apply.<sup>9</sup> However, the primary reason for setting aside the orders was because Young AJA believed Firebird had not complied with pt III, in particular, s 27(1), of the *Immunities Act* in failing to serve the appropriate notice of the proceedings on Nauru.<sup>10</sup> Young AJA also opined that, even if the service requirements did not apply or had not been breached, the Court would have still set aside the garnishee order because the money in the Westpac bank accounts was not commercial property and was, therefore, immune to execution.<sup>11</sup>

##### *B The NSW Court of Appeal*

Upon Firebird's application, the NSW Court of Appeal held that proceedings for registration do fall within the scope of s 9 of the *Immunities Act*.<sup>12</sup> However, it was further held that the exception to immunity for 'commercial transactions' did not apply to Nauru.<sup>13</sup> In doing so, the Court (in particular Bathurst CJ) adopted a narrow interpretation of s 11(1). The Court restricted the transaction covered

---

<sup>8</sup> *Firebird Global Master Fund II Ltd v Republic of Nauru and Others* (2014) 289 FLR 398 [175] (Young AJA).

<sup>9</sup> *Ibid* [79], [111] (Young AJA).

<sup>10</sup> *Ibid* [175] (Young AJA).

<sup>11</sup> *Ibid* [122] (Young AJA).

<sup>12</sup> *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 89 NSWLR 477 [62] (Bathurst CJ).

<sup>13</sup> *Ibid* 514 [69]-[90] (Bathurst CJ).

by the provision to the one in the court at the time, rather than the underlying transaction which gives rise to the registration proceedings.<sup>14</sup> The Court of Appeal therefore held that Nauru was immune from the registration of the foreign judgment in Australia.

The Court also held that the exception of ‘commercial property’ in s 32(3) of the *Immunities Act* applied to the bank accounts held by Westpac and therefore the garnishee order should be set aside.<sup>15</sup> Further, the Court found that Firebird was required to serve the initiating summons on Nauru in accordance with s 27(1).<sup>16</sup> Subsequently, Firebird sought leave to appeal to the High Court of Australia.

## V THE ISSUES

The four issues arising out of the present proceedings before the High Court were:

1. Whether Nauru is immune from the jurisdiction of the Supreme Court of New South Wales in the proceedings for registration of the foreign judgment by virtue of s 9 and 11(1) of the *Immunities Act*;
2. Whether the *Foreign Judgments Act* impliedly repealed the *Immunities Act*;
3. Whether Firebird was required to serve Nauru in accordance with pt III of the *Immunities Act* and;
4. Whether Nauru is immune from execution against its bank accounts, pursuant to s 32(3) of the *Immunities Act*.

## VI THE DECISION OF THE HIGH COURT

*A Nauru is not immune from the proceedings for registration under*

---

<sup>14</sup> Ibid 514 [70] (Bathurst CJ).

<sup>15</sup> Ibid 546 [309] (Basten JA).

<sup>16</sup> Ibid 526 [269] (Basten JA).

*the Immunities Act*1 *The proceedings do fall under s 9 of the Immunities Act*

French CJ and Kiefel J, with whom Gageler J agreed, held that the term ‘proceeding’ in s 9 of the *Immunities Act* should be given its widest meaning.<sup>17</sup> The Court rejected Firebird’s argument that s 9 relates only to those proceedings which a cause of action is pleaded because the generality of the language in s 9 could not support such a construction.<sup>18</sup> French CJ and Kiefel J also recognised that the effect of registration is to create new rights, in favour of Firebird against Nauru and its’ property, which are then enforceable. Thus the proceedings were the kind to which the immunity applied.<sup>19</sup> Nettle and Gordon JJ agreed, finding, that the generalities and broad nature of s 9 are so apparent that it cannot reasonably be argued that it does not apply to proceedings for registration of a foreign judgment.<sup>20</sup>

2 *The proceedings are subject to the exception in s 11(1) of the Immunities Act*

The determination of this issue turned on the proper construction of the term ‘concerns’ in s 11(1). The Court identified two possible outcomes; a broad construction which requires consideration of the underlying proceedings, or a narrow construction which only considers the proceedings at hand.<sup>21</sup> Nauru pleaded in the Court of Appeal, and Bathurst CJ agreed, that a narrow view should be adopted

---

<sup>17</sup> *Firebird Global Master Fund II Ltd v Republic of Nauru and Others* (2015) 90 ALJR 228, 241 [80].

<sup>18</sup> *Ibid* 235 [39] (French CJ and Kiefel J).

<sup>19</sup> *Firebird Global Master Fund II Ltd v Republic of Nauru and Others* (2015) 90 ALJR 228, 238 [48]–[49] (French CJ and Kiefel J), referring to *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* [2012] ICJ Reports 99.

<sup>20</sup> *Firebird Global Master Fund II Ltd v Republic of Nauru and Others* (2015) 90 ALJR 228, 257 [185] (Nettle and Gordon JJ), referring to *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 89 ALJR 975, 984–85.

<sup>21</sup> *Firebird Global Master Fund II Ltd v Republic of Nauru and Others* (2015) 90 ALJR 228, 239 [58] (French CJ and Kiefel J).

because s 17(2) of the *Immunities Act* would be rendered superfluous by a broad interpretation.<sup>22</sup> Nauru further claimed that the express reference to the underlying transaction warranted by ss 17(2) and 19 of the *Immunities Act* render the lack of reference to the underlying transaction in s 11(1) as determinative that such a reference could not be made.

However, the High Court, referring primarily to *NML Capital Ltd v Republic of Argentina*<sup>23</sup>, adopted a broad view of s 11(1). Particular reference was made by French CJ and Kiefel J to Lord Collins' view that it would be 'over-technical' to use the existence of s 17(2) to cut down the scope of s 11(1). Credence was also placed on Lord Phillips' consideration that the question of whether a foreign State is immune should depend on the nature of the underlying transaction.<sup>24</sup> French CJ and Kiefel J also referred to the Australian Law Reform Commission Report, which commented on the distinct differences between an arbitral award, as provided for in s 17(2), and a court proceeding.<sup>25</sup> As such, it is inappropriate to require the reading down of s 11(1) due to the existence of s 17(2).<sup>26</sup>

Nettle and Gordon JJ agreed with this decision, stating that the purpose of the *Immunities Act* is to give effect to the restrictive doctrine of foreign State immunity by denying immunity regarding proceedings that concern commercial transactions. Therefore, it follows that according to the plain and ordinary meaning of the words of s 11(1), a proceeding for the registration of a foreign judgment concerning a commercial transaction is a proceeding which 'concerns' a commercial transaction.<sup>27</sup>

---

<sup>22</sup> *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497, 514 [86] (Bathurst CJ).

<sup>23</sup> *NML Capital Ltd v Republic of Argentina* [2011] 2 AC 495.

<sup>24</sup> *Ibid*, 539.

<sup>25</sup> Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) 61–3 [104]–[107].

<sup>26</sup> *Ibid*.

<sup>27</sup> *Firebird Global Master Fund II Ltd v Republic of Nauru and Others* (2015) 90 ALJR 228, 242 [81] (French CJ and Kiefel J).

### B *The Foreign Judgments Act did not repeal the Immunities Act*

Firebird submitted that s 7(4)(c) of the *Foreign Judgments Act* created an inconsistency with the *Immunities Act* and hence was impliedly repealed. When read with s 7(2)(a)(iv), it provides a ground for setting aside a judgment where a defendant is entitled to immunity. This issue was only covered briefly by French CJ and Kiefel J, with Gageler J agreeing. The justices held that the two statutes deal with different subject matters and insofar as service of an initiating process on a foreign State should be effected by the framework provided in the *Immunities Act*, the *Foreign Judgments Act* can accommodate those means.<sup>28</sup>

### C *Service under pt III of the Immunities Act was not required*

The majority of the High Court found that Firebird did not breach the requirements of s 27(1) of the *Immunities Act* as they only require proof of service where a judgment has been entered against a defendant in default of appearance.<sup>29</sup> French CJ and Kiefel, Nettle and Gordon JJ all agreed that this is not applicable to proceedings for registration under the *Foreign Judgments Act* because, even though issues of immunity may arise, the proceedings are held *ex parte*. Therefore, Firebird was not required to serve Nauru with the initiating process in accordance with s 27(1).<sup>30</sup>

However, Gageler J disagreed with this reasoning, stating that the term ‘judgment’ in pt III is sufficiently broad to include any order made by a court against a foreign State and any application made by a party in an Australian court. Gageler J held that s 27(1) provided a procedural immunity which applied to all proceedings, including the one in the present case, and hence Nauru’s application to have the order for registration set aside pursuant to s 38 of the *Immunities Act* should have been granted.<sup>31</sup>

---

<sup>28</sup> Ibid 243 [88] (French CJ and Kiefel J).

<sup>29</sup> Ibid 244 [95] (French CJ and Kiefel J).

<sup>30</sup> Ibid.

<sup>31</sup> Ibid 250 [147]–[148] (Gageler J).

*D Nauru is immune from execution*

The High Court construed s 32(3) as asking whether the chosen actions represented by bank accounts are in use or are not in use and whether that use is for substantially ‘commercial purposes’.<sup>32</sup> The majority noted that in line with the recommendation of the ALRC, the definition of ‘commercial property’ should be determined independently of the definition of ‘commercial’ in relation to jurisdiction.<sup>33</sup> Therefore, in rejecting Firebird’s submission that an objective view of the use of the funds must be adopted, the High Court adopted a subjective approach which highlights the purpose of the transactions for which the funds are used as the primary consideration, requiring examination of the individual circumstances of the foreign State.<sup>34</sup>

The remoteness of Nauru from other countries combined with the small geographical size and population of the country lead to the finding that the accounts were not used for commercial purposes.<sup>35</sup> This decision was based on the fact that the accounts were held for the purposes of buying and selling of fuel, funding the supply of water, electricity, the operation of a national airline and other related services, all of which are non-commercial activities.<sup>36</sup> The fact was that it is not commercially viable for businesses to provide those services to Nauru and the responsibility therefore lies with the Government. The Court also noted that secondary functions of the accounts that flow from their primary use, such as the accrual of interest, do not render them as being used for commercial purposes,

---

<sup>32</sup> Ibid 245 [104] (French CJ and Kiefel J).

<sup>33</sup> *Firebird Global Master Fund II Ltd v Republic of Nauru and Others* (2015) 90 ALJR 228, 245 [103] (French CJ and Kiefel J); Australian Law Reform Commission, *Foreign State Immunity*, Report No 24, (1984) 77 [125].

<sup>34</sup> *Firebird Global Master Fund II Ltd v Republic of Nauru and Others* (2015) 90 ALJR 228, 263–64 [223]–[224] (Nettle and Gordon JJ).

<sup>35</sup> Ibid 247 [122]–[125] (French CJ and Kiefel J).

<sup>36</sup> *Firebird Global Master Fund II Ltd v Republic of Nauru and Others* (2015) 90 ALJR 228, 247 [123] (French CJ and Kiefel J).

in light of all of the circumstances. Consequently, s 32(3) did not apply, and Nauru was immune from execution against their accounts.

## VII SIGNIFICANCE OF THE DECISION

### *A The departure from 'absolute' immunity and importance of Comity in Private International Law*

There has always been a dispute in private international law as to whether foreign State immunity is 'absolute' in nature, denying courts jurisdiction over foreign States in any circumstances, or merely 'restrictive' which permits the exercise of jurisdiction in some cases.<sup>37</sup> Following the Second World War, States began entering into more private transactions, to which absolute immunity would attach. It was noted by the High Court in *Firebird* that it is necessary for the interests of justice to allow individuals entering into such transactions with States to bring them before the courts.<sup>38</sup> Accordingly, there has been a shift in international law toward adopting a merely restrictive approach in the late twentieth century.<sup>39</sup>

Restrictive immunity is now legislated for in various jurisdictions including but not limited to; in the *Foreign Sovereign Immunities Act 1976* (US), *State Immunity Act 1978* (UK), *State Immunity Act 1979* (Singapore) and the *Foreign Sovereign Immunity Act 1981* (South Africa). These Acts all provide for exceptions to immunity for commercial transactions, among other things. The Australian Law Reform Commission Report, which paved the way for the introduction of the Immunities Act in Australia, proposed the legislation reflect a more restrictive view of the common law immunity that had been taken in other countries and adopted in

---

<sup>37</sup> Richard Garnett, 'Should Foreign State Immunity Be Abolished?' (1999) 20 *Australian Year Book of International Law* 175.

<sup>38</sup> *Firebird Global Master Fund II Ltd v Republic of Nauru and Others* (2015) 90 ALJR 228, 238 [52] (French CJ and Kiefel J).

<sup>39</sup> Garnett, above n 28; *Prefecture of Voiotia v Federal Republic of Germany* (Case No 11/2000) [2].

legislation.<sup>40</sup> This highlights the underlying purpose of the Act to promote the principle of comity in private international law, to which the High Court referred in the present case.

The importance of comity in *Firebird* was noted in particular by Gageler J who stated that ‘a construction which conforms to the customary international law ...is to be preferred’.<sup>41</sup> This approach was also adopted by the Court of Appeal, where it was recognised that a narrow construction of the word ‘concerns’ in s 11(1) may be contrary to what is now regarded as the appropriate position in international law.<sup>42</sup> In support of the principle of restrictive immunity, specific reference was made to *Jurisdictional Immunity of the State*.<sup>43</sup> It was recognised that when considering the registration of a foreign judgment, the court must have regard to the nature of the case in which the judgment was given and must look to the underlying transaction in determining whether the immunity applies, therefore broadening the scope of the exception from immunity to apply.<sup>44</sup>

The importance of comity in private international law was also identified by French CJ and Kiefel J holding that the purpose of s 11(1) is to give effect to the restrictive doctrine of immunity which prevailed in the international community at the time the Act was drafted.<sup>45</sup> Accordingly, the immunity should not be extended to cover commercial transactions.<sup>46</sup> In account of this position, the broad interpretation adopted by the High Court of s 11(1) signifies a further

---

<sup>40</sup> Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) 129 [2].

<sup>41</sup> *Firebird Global Master Fund II Ltd v Republic of Nauru and Others* (2015) 90 ALJR 228, 249 [137] (Gageler J).

<sup>42</sup> *Firebird Global Master Fund II Ltd v Republic of Nauru* (2014) 316 ALR 497, [89] (Bathurst CJ).

<sup>43</sup> *Jurisdictional Immunity of the State (Germany v Italy, Greece intervening)* [2012] ICJ Reps 99.

<sup>44</sup> *Firebird Global Master Fund II Ltd v Republic of Nauru and Others* (2015) 90 ALJR 228, 260 [206] (Nettle and Gordon JJ).

<sup>45</sup> *Ibid* 242 [76] (French CJ and Kiefel J).

<sup>46</sup> *Ibid* 241 [71] (French CJ and Kiefel J).

‘watering down’ of the principle of absolute immunity, and the support for restrictive immunity to be practised in Australia, in accordance with accepted international practice.<sup>47</sup>

The broad interpretation adopted by the High Court in relation to s 11(1) has brought about welcome uniformity in Australian law with regard to State immunity for commercial transactions. It has acted to settle the Australian position in this area, in line with the values of international law and the purpose of State immunity legislation worldwide, therefore supporting the doctrine of comity in private international law.

*B The consideration of surrounding circumstances when determining the applicability of s 32(3) of the Immunities Act*

The significance of this judgment also stems from the fact that it highlights the difficulties involved in enforcing a foreign judgment against assets held in Australia. It establishes a subjective test to be applied in Australia when courts are determining whether or not those assets are used for commercial purposes pursuant to s 32(3) of the *Immunities Act*. In adopting a subjective and comprehensive analysis of the circumstances surrounding Nauru’s bank accounts, the Court was able to reach the most appropriate conclusion; that the money in those accounts was used substantially for the administration and provision of government services. The Court was able to look past the commercial functionality of the funds held in the accounts, and ascertain the true purpose of the money.

The approach adopted by the High Court also serves as a protection for judgment creditors seeking registration of foreign judgments in Australia. A consideration of all of the surrounding circumstances relating to the use of foreign assets under s 32(3) allows Courts to ascertain the true purpose of those assets, rather than to rely on the prima facie function pleaded by the judgment debtor, pursuant to s 41

---

<sup>47</sup> *Philippine Admiral (Owners) v Wallem Shipping (Hong Kong) Ltd* [1977] QB 529; *Trendtex Trading Corporation v Central Bank of Nigeria* [1983] 1 AC 244.

of the *Immunities Act*.<sup>48</sup> Therefore, those parties who seek to ‘hide’ assets in Australia will not be able to rely on the exception in s 32(3) where it should not and cannot be validly claimed.

## VIII CONCLUSION

Overall, this case provided a timely reminder to litigants and commercial entities operating on an international scale of the difficulties involved with enforcing foreign judgments in relation to commercial assets located in a State other than their own- particularly where the judgment debtor is the Government of that State. It also provided some relatively useful guidance on the interpretation of key provisions in the *Foreign Immunities Act* which had been relatively untested in Australia to this point. This decision provided some clarification of the interpretation of s 32(3) of that Act as well as on the position of ‘immunity’ in Australia; particularly on the gradual departure from ‘absolute immunity.’ Most importantly, this case reinforced the importance of comity at the forefront of considerations to be had when making decisions that affect the status of international laws at a domestic level.

---

<sup>48</sup> *Foreign State Immunities Act 1985* (Cth), s 41; this section allows a person performing the functions of the head of a foreign State’s diplomatic mission in Australia, to effect a property certificate to specify the prima facie use of the property.

# THE LEGALITY AND REGULATORY CHALLENGES OF DECENTRALISED CRYPTO-CURRENCY: A WESTERN PERSPECTIVE

CONNOR GAMBLE\*

## Abstract

*Crypto-Currency — Regulation — Decentralised Currency — Blockchain — Algorithmic Currency — FinTech — Transparency — Institutionalised Regulation — Financial Regulation — Anti-Money Laundering — Financial Technology — Counter Terrorism — Bitcoin — Cryptography — Ethereum — Encryption*

*Change is relentless and constant. Currency regulation has traditionally been arduously controlled, laborious, and a balanced process. With evolving technology and the emergence of crypto-currency – an entirely digital currency built on the cryptographic, algorithm based blockchain technology – institutionalised traditional currency regulatory processes have arguably been circumnavigated. This has forced an evaluation of traditional regulatory processes and the place they have in regulating crypto-currency. Where currency crosses borders, tax implications are relevant. Statutory protections are arguably ill-equipped. The crypto-currency market is unhinged, unhampered, and unrestricted, which has led to its use for funding illicit activities.*

*The blockchain technology that underpins this new form of currency is going to transform the way monetary institutions transact, the way that property rights and other vital data are recorded and archived, and provide an effective opportunity for central authorities to issue their own digital currencies. However, the rush to regulate the ‘tip of the iceberg’ in crypto-currency may hamper revolutionary technology developments.*

## I INTRODUCTION

Our contemporary monetary system is built to mutually strengthen and reinforce the role of central bank and commercial bank monies.<sup>1</sup> Crypto-currency, like any other form of currency, is a verifiable record accepted as payment for goods, services and debts in a socio-economic context.<sup>2</sup> As with all currency, crypto-currency has value only as a result of the intangible value participating members of society have placed on it.<sup>3</sup> Where currency could have in the past been exchanged directly for precious metal as part of the ‘gold standard’ system,<sup>4</sup> the United States (‘US’) dollar is now predominantly intangible in nature.<sup>5</sup> A glare from the sea of computer monitors on Wall Street represents our cumulative wealth. Today, currency is not held in vaults, but in data centres.<sup>6</sup> The face of the financial industry has changed. Our currency is moved, traded, stored, validated and verified by a non-tangible network of computers.

How apt then, that the technology used to safely transact our traditional currencies both domestically and internationally – algorithm based encryption – has now been used to create something more; an encryption based currency, decentralised in nature, and

---

\* Law student (LLB) at Curtin University of Technology. With special thanks to my father, Mike Gamble.

<sup>1</sup> Committee of Payment Settlement Systems, *The Role of Central Bank Money in Payment Systems* (August 2003) Bank for International Settlements <<http://www.bis.org/cpmi/publ/d55.pdf>>.

<sup>2</sup> Frederic S Mishkin, *The Economics of Money, Banking and Financial Markets* (Pearson/Addison Wesley, 2006) 52.

<sup>3</sup> A C Pigou, *The Value of Money* (1917) 32 *The Quarterly Journal of Economics* 38, 39–40.

<sup>4</sup> Barry J Eichengreen and Marc Flandreau, *The Gold Standard in Theory and History* (Routledge, 2<sup>nd</sup> ed, 1997) 2–3.

<sup>5</sup> Peter L Bernstein, *A Primer On Money, Banking and Gold* (Wiley, 1<sup>st</sup> ed, 2008) 128.

<sup>6</sup> Rich Miller, *What The 'New Heart of Wall Street' Looks Like* (2 January 2011) Data Centre Knowledge <<http://www.datacenterknowledge.com/archives/2011/01/02/what-the-new-heart-of-wall-street-looks-like/>>.

arguably more secure from institutionalised crime and restraint. It is the value the users of a system place in the system itself that creates value. Although once considered nothing more than a fad,<sup>7</sup> crypto-currencies can no longer be ignored by regulators. As a collective, users have decided that the system's worth: there are more than 730 crypto-currencies in circulation; 21 achieve a market cap of more than US\$10 million.<sup>8</sup> With a market cap of more than US\$10 billion, Bitcoin<sup>9</sup> (BTC) eclipses others in existence.<sup>10</sup> The inherent transparency in the way crypto-currency must operate, due to the underlying blockchain technology, has proved attractive enough for users of the system to place faith in it, and purchase the property of crypto-currency using conventional currency.<sup>11</sup>

Given the value of crypto-currency in contemporary society, regulators have a keen interest in controlling the asset in order to protect consumers.<sup>12</sup> It is not a question of whether crypto-currency should be regulated, but how.<sup>13</sup>

---

<sup>7</sup> David Weidner, *Bitcoin Fever is a Fool's Gold Rush* (3 December 2013) MarketWatch <<http://www.marketwatch.com/story/bitcoin-fever-is-a-fools-gold-rush-2013-12-03>>.

<sup>8</sup> *Crypto-Currency Market Capitalizations* (26 July 2016) CoinMarketCap <<https://coinmarketcap.com/all/views/all/>>.

<sup>9</sup> BTC is the largest and most valuable crypto-currency currently in circulation. See Kim Iskyan, *Here is Why Bitcoin is the World's Best-Performing Crypto-currency* (20 June 2016) The Street <<https://www.thestreet.com/story/13613199/1/here-is-why-bitcoin-is-the-world-s-best-performing-crypto-currency.html>>.

<sup>10</sup> *Crypto-Currency Market Capitalizations* (26 July 2016) CoinMarketCap <<https://coinmarketcap.com/all/views/all/>>.

<sup>11</sup> Reuben Grinberg, 'Bitcoin: An Innovative Alternative Digital Currency' (2011) 4 *Hastings Science & Technology Law Journal* 160, 198.

<sup>12</sup> Arvind Narayanan et al., *Bitcoin and Crypto-currency Technologies*, (Princeton University Press, 1<sup>st</sup> ed, 2016) 168.

<sup>13</sup> Sarah Jane Hughes and Stephen T Middlebrook, 'Advancing a Framework for Regulating Cryptocurrency Payments Intermediaries' (2015) 32 *Yale Journal on Regulation* 495, 498.

## II WHAT IS CRYPTO-CURRENCY?

It is beyond the scope of this paper to describe in detail the inner workings of a crypto-currency system; it is a non-static, developing, ‘living and breathing’ system.<sup>14</sup> The aim of this section is to provide a generalist overview of an inherently complex, computer code-based currency.

Crypto-currency is essentially a ‘peer to peer’ currency system, which operates, philosophically in a rather simplistic way, albeit wrapped in a technical shroud, with variants of the system growing daily.<sup>15</sup> It is akin to a simple economic model; a party purchases a good or service in exchange for a digitally unique code, and this code can thereafter be exchanged for other goods or services. The code itself is incomprehensible to the user, in the same way that a piece of ‘paper’ currency does not in itself hold any intrinsic value to the holder. The purchase is recorded in a digital public ledger, called the blockchain, while other users’ computers, playing their part of the system, verify this transaction against previous versions of the ledger, ensuring the transaction is valid and using legitimate pieces of the finite crypto-currency.<sup>16</sup>

The distinguishing factor from traditional forms of currency is that there is no administrative influence and no intervention from a

---

<sup>14</sup> Peter Vanham, *Blockchain Will Become ‘Beating Heart’ of The Global Financial System* (12 August 2016) World Economic Forum <<https://www.weforum.org/press/2016/08/blockchain-will-become-beating-heart-of-the-global-financial-system/>>. For a more technical analysis of the way crypto-currency operates, see Pedro Franco, *Understanding Bitcoin: Cryptography, Engineering and Economics* (John Wiley & Sons, 1<sup>st</sup> ed, 2015); Andreas M Antonopoulos, *Mastering Bitcoin: Unlocking Digital Cryptocurrencies* (O’Reilly Media, 1<sup>st</sup> ed, 2014).

<sup>15</sup> Vanham, above n 14.

<sup>16</sup> Don Tapscott and Alex Tapscott, *Blockchain Revolution: How the Technology Behind Bitcoin Is Changing Money*, (Portfolio, 1<sup>st</sup> ed, 2016) 6–8.

regulatory authority. Therefore, the system is more akin to classical economics:

No authority is responsible for issuing and managing the Bitcoin system. It has operational rules open to everyone (i.e. transparent). No discretionary intervention is expected to happen. According to Nakamoto, 'a purely peer-to-peer version of electronic cash would allow online payments to be sent directly from one party to another without going through a financial institution'.<sup>17</sup>

The focus of this paper is this decentralised aspect, for it is this characteristic that gives crypto-currency its collective power, while at the same time presenting authoritative stakeholders with an as yet unsolved conundrum: decentralisation.<sup>18</sup>

### III UNITED STATES OF AMERICA

#### *A Status*

The US first classified crypto-currency in 2013 as a 'convertible virtual currency' and this term was reaffirmed in the case of *Florida v Espinoza* ('*Espinoza*').<sup>19</sup> In essence, the US have taken steps towards legitimising crypto-currency, but have yet to make firm assertions, other than warning investors to be cautious before engaging in trading activities.<sup>20</sup> The Internal Revenue Service and the United States Treasury confirmed that crypto-currency does not have

---

<sup>17</sup> Mitsuru Iwamura, et al. 'Is Bitcoin the Only Crypto-currency in the Town? Economics of Crypto-currency and Friedrich A. Hayek' [28 February, 2014] *Institute of Economic Research Hitotsubashi University Kunitachi 2*.

<sup>18</sup> Christian Scheinert, *Virtual currencies challenges following their introduction* (March 2016) European Parliamentary Research Service <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/579110/EPRS\\_BRI\(2016\)579110\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/579110/EPRS_BRI(2016)579110_EN.pdf)>.

<sup>19</sup> F14-2923 (11<sup>th</sup> Cir, 2016).

<sup>20</sup> *Investor Alert: Bitcoin and Other Virtual Currency-Related Investments* (5 July 2014) US Securities and Exchange Commission, <<https://investor.gov/news-alerts/investor-alerts/investor-alert-bitcoin-other-virtual-currency-related-investments#.U3GCQ61dVD4>>.

the status of ‘legal tender’ in any state. Rather, crypto-currency is treated as property.<sup>21</sup>

B *Florida v Espinoza*<sup>22</sup> (‘Espinoza’)

With so few crypto-currency related cases yet to pass through the traditional judicial system, of note is the 2016 case of *Espinoza*. The case involved Mr Michell Espinoza, a seller of Bitcoin, who was singled out<sup>23</sup> after a Detective for the Miami Beach Police Department ‘became intrigued of the possibility’ of investigating ‘virtual currencies’.<sup>24</sup> Justice Pooler ruled that Bitcoin is not currency.<sup>25</sup> This has set a benchmark in the judicial branch. It is certainly unclear how long this ruling will stand, or if, and when it will be challenged. As per Pooler J’s comments, due to crypto-currencies decentralised system and its volatility, they ‘have a limited ability to act as a store of value’.<sup>26</sup> Her Honour made a clear distinction between currency and crypto-currency. This statement is of particular contemporary significance, as it reveals, with respect, a lack of understanding of the technology on the part of Pooler J. For example, in the days following the Brexit vote, the Sterling Pound was less stable than Bitcoin, showing its ‘value’ and surprising such traditionalist views.<sup>27</sup>

---

<sup>21</sup> Keith A Aquino of the Office of Associate Chief Counsel (Income Tax & Accounting), *IRS Virtual Currency Guidance* (14 April 2014) Internal Revenue Service Notice 2014–21 <<https://www.irs.gov/pub/irs-drop/n-14-21.pdf>>.

<sup>22</sup> F14–2923 (11<sup>th</sup> Cir, 2016).

<sup>23</sup> Ibid 1 [2] (Pooler J).

<sup>24</sup> Ibid 1 [1] (Pooler J).

<sup>25</sup> Ibid 6 [22] (Pooler J): ‘...however, attempting to fit the sale of Bitcoin into a statutory scheme regulating money services businesses is like fitting a square peg in a round hole’.

<sup>26</sup> Ibid 2 [1] Pooler J.

<sup>27</sup> Andrew Griffin, *The Pound Has Officially Become More Unstable Than Bitcoin* (10 July 2016) The Independent <<http://www.independent.co.uk/news/business/news/brexit-pound-sterling-bitcoin-prices-unstable-volatile-exchange-referendum-a7129311.html>>.

### C Regulation

The US began as the leader in crypto-currency regulation. Legitimate companies choosing to exchange in crypto-currency must adhere to strict 'Know Your Customer' ('KYC') and 'Anti Money Laundering' ('AML') rules, the same rules that apply to banks and other financial institutions.<sup>28</sup> Further, the US created programs such as the 'BitLicence', which sets out a framework for any person engaged in 'virtual currency business activity'.<sup>29</sup> Notwithstanding, this attempt at regulation after a long period of discourse and feedback from the Bitcoin industry concluded that requiring adherence to the BitLicence regulatory framework would be 'almost impossible'.<sup>30</sup>

The US has since fallen behind other countries in attempting to regulate crypto-currency. The New York State Department of Financial Services ('NYDFS') set rules that apply to financial service businesses trading in crypto-currency: 'they are intended to apply to companies providing virtual currency financial services, but do not apply to merchants or consumers that use virtual currency solely for the purchase or sale of goods or services'.<sup>31</sup> In the US, the confirmation of crypto-currency as property led to them creating a set of conditions which other countries have echoed in their quest to digest the implications of blockchain technology.<sup>32</sup>

---

<sup>28</sup> Helga Danova, *KYC, AML and Bitcoin - CEX.IO Official Blog* (20 July 2014) CEX.IO Official Blog <<http://blog.cex.io/cryptonews/kyc-aml-and-bitcoin-6086>>.

<sup>29</sup> *200 Regulations of the Superintendent of Financial Services*, 23 NY Reg 200.3 (2 June 2015).

<sup>30</sup> Danish Javed, *Bitlicense: An Overview* (6 December 2014) The Merkle <<http://themerke.com/bitlicense-overview/>>.

<sup>31</sup> Alan McQuinn et al., *'Bitlicenses' Explained* (2 September 2014) The Innovation Files <<http://www.innovationfiles.org/bitlicenses-explained/>>.

<sup>32</sup> *Guidance on the Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies*, 31 CFR § 1010.100(ff) (18 March 2013).

Technology development seems to always be just out of the reach of lawmakers, left behind with the laborious task of passing legislation while creators continue to create unabated.<sup>33</sup> The risk with Bitcoin and other crypto-currencies is that, due to its decentralised system, a regulatory authority may never be at the helm.<sup>34</sup> This may be troubling, dependant on perspective. From an authoritative view, there is a necessity to regulate in order to maintain control and ward off illicit uses of the technology. There is, however, a risk of stifling growth with ill-conceived statutory constriction. A balance must be struck.

#### IV AUSTRALIA

##### A Status

The Australian Taxation Office ('ATO') has stated that the act of transacting in crypto-currency is 'akin to a barter arrangement'.<sup>35</sup> The view the ATO takes is that BTC, and by extension all crypto-currency, is neither a domestic currency nor a foreign currency, and the supply of crypto-currency is not a 'financial supply' for goods and service tax purposes.<sup>36</sup> The ATO see BTC as an asset and similar to the finding in *Espinoza*, it is characterised more like a 'good,' in the traditional sense of the word, rather than a currency. Therefore, capital gains taxation provisions are invoked where relevant.

##### B Regulation

---

<sup>33</sup> Lyria Bennett Moses, 'Adapting the Law to Technological Change: A Comparison of Common Law and Legislation' (2003) 26(2) *University of New South Wales Law Journal* 394, 394.

<sup>34</sup> *Espinoza*, 6 [22] (Pooler J).

<sup>35</sup> Australian Taxation Office, *Tax Treatment of Crypto-Currencies in Australia - Specifically Bitcoin* (18 December 2014) Australian Taxation Office <<https://www.ato.gov.au/General/Gen/Tax-treatment-of-crypto-currencies-in-Australia---specifically-bitcoin/>>.

<sup>36</sup> *Ibid.*

The current Australian view of regulators is optimistic, in that several government bodies have stated regulation of the crypto-currency is imminent.<sup>37</sup> Australia would become one of the first countries to attempt to regulate the currency, choosing to do so under the guise of ‘anti-money laundering’ and ‘counter-terrorism financing’ laws.<sup>38</sup> A report released in 2014 by Australia’s financial intelligence agency, the Australian Transaction Reports and Analysis Centre (‘AUSTRAC’), takes the firm and narrow view that crypto-currency is a known and developed method of funding terrorism domestically and internationally.<sup>39</sup> Although the report concedes that digital currencies have legitimate uses, it is the act of transferring convertible digital currencies that occurs without passing through a formal financial sector which raises specific concerns.<sup>40</sup>

Undoubtedly, this is a key argument for attempting to regulate crypto-currency across all jurisdictions. Terrorism is a legitimate risk in contemporary society, and tools used by those wishing to incite terror should be kept at an arm’s length. Notwithstanding, the prevailing question soon becomes: how can one regulate crypto-currency? As yet, there is no definitive method. However, in a recently released report reviewing the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth), a move to include crypto-currency has become firmly established in Australia.<sup>41</sup> The report states that digital currency should be included under the regime. Recommendation 4.10 provides:

---

<sup>37</sup> Australian Transaction Reports and Analysis Centre (Cth), *Terrorism Financing in Australia* (2014) 23.

<sup>38</sup> Jewel Topsfield, *Australia to Regulate Bitcoin Under Counter-Terrorism Finance Laws* (8 August 2016) The Sydney Morning Herald <<http://www.smh.com.au/world/australia-to-regulate-bitcoin-under-counterterrorism-finance-laws-20160808-gqgne2.html>>.

<sup>39</sup> Australian Transaction Reports and Analysis Centre (Cth), above n 23.  
<sup>40</sup> Ibid.

<sup>41</sup> Department of the Attorney General (Cth), *Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and Associated Rules and Regulations* (2016) 4.

The *AML/CTF Act* should be amended to regulate activities relating to convertible digital currency, particularly activities undertaken by digital currency exchange providers.<sup>42</sup>

This recommendation, while admirable, is too vague. The entire crypto-currency environment is decentralised in nature, crossing all borders simultaneously. As the code is not ‘at home’ in any one place or server, therefore the idea of attempting to regulate the currency will, at this point in time, likely fail.<sup>43</sup> The Australian government responded to a Senate report in which lawmakers argued that the country should bring domestic digital currency exchanges under existing anti-money laundering (AML) and counter-terrorist financing (CTF) rules in a paper released in May 2016, widely agreeing with the Senate’s findings.<sup>44</sup> The desire for the ATO to control the flow of crypto-currency stems from the very function of the office. Notwithstanding, their current method of control relies almost entirely on a transactors, buyers, or sellers reporting to them.<sup>45</sup> Arguably then, this method of control highlights their lack of control.

It is the very nature of crypto-currency to be transparent, but this transparency belongs to the computer code, and is not characteristic of the people behind the code. The lack of institutional oversight, the decentralised nature, and the cryptographic principles prevail. This leaves the ATO in the distance, left only with an ability to plead with the public to report any income derived. With the vast statutory powers of the ATO, the ability to discover fraudulent reporting, or

---

<sup>42</sup> Ibid 157.

<sup>43</sup> Jamie Redman, *Government Planners Will Fail at Regulating Bitcoin*, (12 May 2016) Bitcoin News <<https://news.bitcoin.com/government-will-fail-regulating-bitcoin/>>.

<sup>44</sup> Department of the Treasury (Cth), *Government Response to the Senate Economics References Committee Report: Digital Currency—Game Changer or Bit Player* (2016) 1.

<sup>45</sup> Evident in the Australian Taxation Office’s requirements of reporting, yet crypto-currency can be transacted, held, traded, and sold with relative anonymity.

lack of reporting, is certainly of note.<sup>46</sup> However, one must sell crypto-currency, if taking the view that crypto-currency is a good or token like product or, alternatively, exchange the crypto-currency for a regulated currency, before the ATO could monitor any profit derived.<sup>47</sup>

## V UNITED KINGDOM

### A Status

The United Kingdom ('UK') is one of Earth's largest financial centres, servicing economic regions across the globe and providing capital from the US to the European Union.<sup>48</sup> Regardless, the UK takes the stance of most of the Western world, which provides that crypto-currency is not formally recognised as a currency, although is applicable to capital gains taxation.<sup>49</sup> The government has officially stated:

The advent of cryptocurrencies such as Bitcoin is a new and evolving area and determining their legal and regulatory status is ongoing. Cryptocurrencies have a unique identity and cannot therefore be directly compared to any other form of investment activity or payment mechanism.<sup>50</sup>

From this, it is clear that the UK status is unclear, which provides a challenge for users of crypto-currency. Due to the UK's status on the

---

<sup>46</sup> *Taxation Administration Act 1953* (Cth) s 353–10(1); *Income Tax Assessment Act 1936* (Cth) s 264A.

<sup>47</sup> Of note, this circumstance would only apply if the profit described were to pass through the regulated financial sector, further illustrating difficulties.

<sup>48</sup> *Xinhua Dow Jones International Financial Centres Development Index* (6 November 2014) National Financial Information Centre Index Research Institute Standard & Poor's Dow Jones Index Co. <<http://www.sh.xinhuanet.com/shstatics/zhuanti2014/zsbg/en.pdf>>.

<sup>49</sup> HM Revenue & Customs (UK), *Revenue and Customs Brief 9 – Bitcoin and other cryptocurrencies* (3 March 2014).

<sup>50</sup> *Ibid.*

global stage as a leader of the financial world, eventually a stance must be taken.

### B Regulation

The relevant regulating body in the UK, the Financial Conduct Authority ('FCA'), states that they wish to ensure a positive developmental environment for virtual currency, supported by regulation.<sup>51</sup> There is a desire to regulate exchanges as opposed to 'digital wallet providers' or digital holders of the currency. A report released by the HM Treasury in April 2016 states that:

This [focus on exchanges] is consistent with a risk-based approach, and we note that extending the perimeter of anti-money laundering regulations beyond digital currency exchange firms (e.g. to wallet providers) would not deliver any benefits in terms of mitigating money laundering and terrorist finance risk, and would place significant burdens on firms in this innovative and embryonic sector.<sup>52</sup>

This level headed approach appears to take the most reasonable stance in the Western world, further providing that evidence points to 'a low level of illicit activity in digital currency networks'.<sup>53</sup> The report alludes to the government's plan to overhaul anti-money laundering law by 2018 to further include 'virtual currencies'.<sup>54</sup> Thus, the UK may provide the most sensible guiding light to lawmakers, relying on

---

<sup>51</sup> Mary Starks, *Disruptive Innovation in Financial Markets* (26 October 2015) Financial Conduct Authority <<http://www.fca.org.uk/news/disruptive-innovation-in-financial-markets>>.

<sup>52</sup> HM Treasury and Home Office (UK), *Action Plan for anti-money laundering and counter-terrorist finance* (21 April 2016) 19.

<sup>53</sup> Ibid.

<sup>54</sup> Stan Higgins, *UK Treasury Won't seek AML rules for Bitcoin wallet providers* (25 April 2016) CoinDesk <<http://www.coindesk.com/uk-treasury-we-wont-regulate-bitcoin-wallet-providers/>>.

statistical fact, but this process is ongoing and the overhaul of relevant laws in the near future will enlighten.

## VI CANADA

### *A Status*

Crypto-currency in Canada is currently classified as 'intangible' under the *Personal Property Security Act*.<sup>55</sup> There are also no cases of note related to crypto-currency in Canada.<sup>56</sup> This presents a common legal problem across the West: crypto-currency has not yet convincingly been debated in the forum of the judicial branch. The Canada Revenue Agency has advised that 'the buying and selling of [crypto-currency] could result in capital gains (and possible capital losses) and that transactions involving [crypto-currency] should be reported as in any other barter transaction'.<sup>57</sup> Therefore, the status of crypto-currency in Canada is that of a blend of views held by Australia and the US. This is because the nation's taxation agency classifies crypto-currency as property,<sup>58</sup> subject to property taxation laws and additionally as an intangible good.<sup>59</sup>

### *B Regulation*

Regulation of crypto-currency in Canada has taken its first steps down a similar path to that of Australia, the path of attempting to impose constraints under the guise of national security pursuant to the

---

<sup>55</sup> *Personal Property Security Act*, RSO 1990 c P-10, as amended.

<sup>56</sup> Sandra Appel, *Can you take a security interest in Bitcoin?* - Finance and Banking - Canada (13 June 2014) Mondaq.com <<http://www.mondaq.com/canada/x/313572/securitization+structured+finance/Can+You+Take+A+Security++Interest+In+Bitcoin>>.

<sup>57</sup> Ibid.

<sup>58</sup> Victoria van Eyk, *What Canada's New Regulations Mean for Bitcoin Businesses* (24 June 2014) CoinDesk <<http://www.coindesk.com/canadas-new-regulations-mean-bitcoin-businesses/>>.

<sup>59</sup> *Personal Property Security Act*, RSO 1990, c P-10, as amended; *Securities Transfer Act*, 2006 SO 2006 c 8.

*Proceeds of Crime (Money Laundering) and Terrorist Financing Act.*<sup>60</sup> This path, however, has been paved with its fair share of criticism, mainly concerning the definition by which crypto-currency is defined.<sup>61</sup> The term ‘dealing in virtual currencies,’ at s 256(2) para 5(h) is left open to interpretation, making it difficult to decisively ascertain a Canadian position.

It is clear that Canada desires crypto-currency regulation and like Australia, is attempting to do so under anti-terrorism finance laws. This path, though, seems to highlight the lack of fundamental understanding law makers have on the technology, associating crypto-currency primarily with illicit uses. This stance may represent a hasty attempt to take a position on crypto-currency publicly, perhaps for political reasons, as opposed to well-considered regulation that is in the public interest.

#### VII SHOULD CRYPTO-CURRENCY BE REGULATED?

Regulating crypto-currency presents institutions of governance with a technically and politically charged problem, and one, arguably, that governing bodies must first learn before they can regulate. It is clear through the identified risks that BTC and other crypto-currency generally should be regulated.<sup>62</sup> The power of currency drives growth in our society. However, traditional forms of currency are not suddenly ‘safe’ due to regulation; to believe that regulation of crypto-currency will immediately alleviate all risk of illicit use is naive.

The key difference between traditional currency and crypto-currency is the lack of an administrator in the latter. This gives rise to money laundering vulnerabilities but one must remember that traditional currency is not infallible and is subject to similar vulnerabilities. One

---

<sup>60</sup> *Securities Transfer Act 2006* SC 2000 s c17.

<sup>61</sup> Van Eyk, above n 58.

<sup>62</sup> David Yermack, *Is Bitcoin a real currency? An economic appraisal* (1 April 2013) National Bureau of Economic Research <<http://ssrn.com/abstract=2361599>>.

of the 'biggest challenges is striking the right balance between the costs and benefits of regulation [of crypto-currency]'.<sup>63</sup>

#### VIII CONCLUSION

It is beyond doubt that crypto-currency must be regulated, but the question of how such a vague but necessary goal can be achieved remains unanswered. A common trait of government, in response to that which it does not understand, is to attempt to control it. It is clear that the current unregulated status of crypto-currency may soon change. However, it is unclear how governments hope to achieve this goal, as they have provided no technical premise to regulate crypto-currency other than relying on the concept of self-reporting. This presents a problem: users who wish to use crypto-currency for illicit reasons may continue to do so unabated by a law written on paper, while they, in response, transact in milliseconds using micro-processors. It is an age-old conundrum: how can the law keep up with technology? This question may be left again unanswered as the divide between law and technology only widens.

Western States like Australia, Canada, the US and the UK all currently classify crypto-currency as an asset rather than a currency, for the key reason that crypto-currency does not pass through an institutionalised financial sector. Assets have value, but a non-static market defines that value. Currency has more stringent regulation, where a centralised institution can gently manipulate the market to guide the currency. Conversely, due to the decentralised nature of crypto-currency, traditional forms of regulation are quite simply incompatible. The philosophical nature of crypto-currency actively prevents centralisation, as centralisation creates a set of defined, well known problems.<sup>64</sup> However, the decentralised nature of crypto-currency has created an arguably unknown, undefined set of problems: money laundering, terrorism financing, and an illicit goods

---

<sup>63</sup> Jennifer S Calvery, 'Virtual Currency Efforts' (Speech delivered at West Coast AML Forum, San Francisco, CA, 19 November 2013).

<sup>64</sup> Andrew Barber, 'Bitcoin and The Philosophy of Money: Evaluating the Commodity Status of Digital Currencies' (2015) 4(2) *Virgin Tech Spectra Journal* [4.2.6].

and services global marketplace. These problems are not yet solved, and they are problems authorities understand require intervention, but do not understand how to implement intervention, or what 'intervention' even is in this instance.

The desire to regulate does not amount to the ability to regulate. Unless authorities take the time to understand the core decentralised nature of crypto-currency, and seek to harness, rather than restrain the power of blockchain technology, crypto-currency will arguably become more anti-establishment. It may grow to be utilised more for illicit purposes, for no other reason than simply the fact that it is draped in fear, due to a lack of understanding by governments and regulators.

# CLIMATE CHANGE LITIGATION: URGENDA V THE STATE OF NETHERLANDS

RAY MUYUNDA\*

## Abstract

*Climate Change — Duty of Care of States — Netherlands — Urgenda Foundation — Legal Obligations — Greenhouse Gas Emissions — Reduction Targets — Global Reduction Schemes — Kyoto Protocol*

*On 24 June 2015, The Hague District Court delivered a significant judgement in the area of climate law. The judgment is the momentous in the sense that the Court imposed a minimum greenhouse gas emissions target on the State. The judgment was made in response to a perceived duty of care of the State owed to the population of the Netherlands and the international community. This article will provide a summary of the case and context to how this decision was reached.*

## I INTRODUCTION AND FACTS

The Urgenda Foundation ('Urgenda') is a citizens' forum which was formed with the aim of promoting a sustainable society focusing initially on the Netherlands ('the State').<sup>1</sup> In bringing the climate change action to the Hague District Court, Urgenda was acting on behalf of 886 individuals.<sup>2</sup> Before the proceedings commenced, Urgenda, wrote a letter to the Prime Minister urging that the State commit to a reduction of carbon dioxide ('CO<sub>2</sub>') emissions by 40 percent by 2020, in comparison to the recorded emissions in 1990.<sup>3</sup> The State responded, reasserting their commitment to the reduction of CO<sub>2</sub> emissions. The State also commented that collective global

---

\* Law Student (LLB) at Curtin University of Technology.

<sup>1</sup> *Urgenda Foundation v Kingdom of the Netherlands* [2015] Case C/09/456689/HA ZA 13 1396 [2.1].

<sup>2</sup> *Ibid* [2.4].

<sup>3</sup> *Ibid* [2.6].

actions are necessary for the emissions targets of 25 to 40 percent and that the current global efforts fall far below achieving this target.

Urgenda argued that the State was negligent by not adequately regulating and curbing Dutch greenhouse gas emissions ('GHG').<sup>4</sup> Urgenda also argued that the climate change caused by the CO<sub>2</sub> emissions were contrary to the duty of care owed to society and as such, were in breach of their duty owed to Urgenda.<sup>5</sup> Urgenda further argued that as these emissions occur within the territory of the State, the State has the capability, as a sovereign power, to manage and control these emissions.<sup>6</sup> The State, on the other hand, argued that Urgenda had no cause of action because they were attempting to defend the rights and interests of other generations in other countries and jurisdictions.<sup>7</sup> The State further acknowledged that while it is important to limit global emissions, the State is under no legal obligation to take measures to achieve these targets.<sup>8</sup>

## II THE ASSESSMENT OF THE COURT

The case before the Court considered the question of whether the State had a legal obligation to place limits on CO<sub>2</sub> emissions. The Court admitted that it lacked the expertise in this complicated and scientific dispute, and therefore would base its analysis of the dispute on facts agreed by both parties and recognised to be correct by the State.<sup>9</sup>

### *A Urgenda's standing*

---

<sup>4</sup> Ibid [3.1].

<sup>5</sup> Ibid [3.2].

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid [3.3].

<sup>9</sup> Ibid [4.3].

The *Dutch Civil Code*<sup>10</sup> permits only a legal person who has a personal right to bring a cause of action.<sup>11</sup> Under the *Civil Code of the Netherlands* (Netherlands) ('Civil Code'), a foundation with legal capacity can bring an action to the Courts pertaining to the protection of general interests so long as the foundation represents those specific interests as stated in its bylaws.<sup>12</sup> Based on its bylaws, Urgenda relied on the defence of a sustainable future, claiming that the emissions of CO<sub>2</sub> threaten the future generations of Urgenda members.

The State did not challenge the fact that Urgenda had standing to bring the action.<sup>13</sup> However, they argued that Urgenda has no case insofar as it defends the rights or interests of current or future generations in other countries.<sup>14</sup> The Court held that Urgenda had standing to defend the rights of both current generations and future generations to the availability of natural resources and a safe and healthy living environment as provided for by the *Dutch Civil Code*.<sup>15</sup> In reaching this decision, the Court considered the intergenerational dimension of the term 'sustainable future'.<sup>16</sup> The Court also considered that in establishing the issue of standing, Urgenda had relied on legally relevant norms as laid out in, for example, art 2 of the United Nations Framework Convention on Climate Change ('UNFCCC') and arts 2 and 8 of the European Convention on Human Rights ('ECHR'). The ability to invoke these provisions can be found in the Urgenda bylaws.<sup>17</sup>

### B *The issues presented*

The issue, at its core, was whether the State could be compelled by Urgenda to reduce GHG emissions. In determining this issue, the

---

<sup>10</sup> *Civil Code of the Netherlands* (Netherlands).

<sup>11</sup> *Civil Code of the Netherlands* (Netherlands) Book 3 s 303.

<sup>12</sup> *Civil Code of the Netherlands* (Netherlands) Book 3 s 303a.

<sup>13</sup> *Urgenda Foundation v Kingdom of the Netherlands* [2015] Case C/09/456689/HA ZA 13–1396 [4.5].

<sup>14</sup> *Ibid* [4.5].

<sup>15</sup> *Ibid* [4.6]–[4.7].

<sup>16</sup> *Ibid*.

<sup>17</sup> *Ibid* [4.8]–[4.9].

State did not deny findings brought forward by the Intergovernmental Panel on Climate Change ('IPCC').<sup>18</sup> Other reports from various international bodies such as the United Nations Environment Programme<sup>19</sup> and the International Energy Agency<sup>20</sup> were also used by the Court.

The Court considered that the issue could be broken into three main questions:

1. The severity and scale of the alleged climate change and what reduction is necessary to avert this danger?
2. Does the increased danger of climate change impose an obligation on the Dutch State to impose larger reduction measures?
3. As climate change is a highly political matter, is there a conflict of interest in the separation of powers?<sup>21</sup>

### *C The severity of the climate change issue*

When determining the first question, the Court relied on the IPCC reports<sup>22</sup>, which establishes the presence of global climate change, most likely attributable to human actions.<sup>23</sup> These conclusions are saliently contained in IPCC AR4/2007 and AR5/2013.<sup>24</sup> The IPCC

---

<sup>18</sup> See, IPCC, '*Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*' (2007) Geneva, Switzerland 104.

<sup>19</sup> United Nations Environment Programme, *Annual Report 2013*, UN Doc DCP/1792/NA (2014).

<sup>20</sup> International Energy Agency, *World Energy Outlook 2013* (2013) Corlet, France.

<sup>21</sup> *Urgenda Foundation v Kingdom of the Netherlands* [2015] Case C/09/456689/HA ZA 13–1396, [3.1].

<sup>22</sup> IPCC, '*Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*' (2007) Geneva, Switzerland.

<sup>23</sup> *Urgenda Foundation v Kingdom of the Netherlands* [2015] Case C/09/456689/HA ZA 13–1396 [4.14].

<sup>24</sup> IPCC, '*Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate*

reports point primarily to a rise in the use of fossil fuels and deforestation as the main causes of observable global warming.<sup>25</sup> In AR/2007, the IPCC states that a temperature rise of over 2° celcius more than the pre-industrial levels would result in dangerous and irreversible climate change.<sup>26</sup> As signatories of the UN Climate Change Convention have accepted these findings, the Court decided to use the 2° celcius target as the starting point for the development of climate change policy.<sup>27</sup> Neither party disputed the severity of the consequences of the rise in global warming or the fact that with the current temperature changes, the damage done to man and the environment would be irreversible.<sup>28</sup> Given the serious nature of any potential rise in temperature, the Court considered at the most cost effective ways to stay within this target.<sup>29</sup>

#### D *The reduction targets*

The Court also looked at the measures needed to achieve this target. The IPCC in AR4/2007 established that GHG emissions in the atmosphere need to be stabilised at 450 ppm (parts per million), which the Court referred to as “the 450 scenario”.<sup>30</sup> The parties did not dispute the fact the 2° celcius target has a 50 percent chance of success with the 450 scenario.<sup>31</sup> In reference to AR5/2013, the Court concluded that a strong preference for the 450 scenario exists in light of the scientific considerations.<sup>32</sup>

Following on from the Court’s conclusion that climate change was a serious issue and the 450 scenario was the best way to achieve the required target, the Court decided to turn its attention to the current

---

*Change*’ (2007) Geneva, Switzerland, 104; IPCC, ‘Fifth Assessment Report – Climate Change 2013’ (2013) Geneva, Switzerland.

<sup>25</sup> Ibid [4.4].

<sup>26</sup> *Urgenda Foundation v Kingdom of the Netherlands* [2015] Case C/09/456689/HA ZA 13–1396 [4.14].

<sup>27</sup> Ibid.

<sup>28</sup> Ibid [4.16].

<sup>29</sup> Ibid [4.17].

<sup>30</sup> Ibid [4.20].

<sup>31</sup> Ibid.

<sup>32</sup> Ibid [4.22].

reduction targets and the reduction targets necessary to achieve the 2° celcius target. In AR4/2007 the IPCC determined that to prevent the concentration level from exceeding the 450 ppm mark, countries such as the Netherlands would have to reduce emissions by 20 to 40 percent in 2020 compared to the 1990 levels.<sup>33</sup> For context, the European context, the European Council set a collective target of a 30 percent reduction by 2020 compared to 1990.<sup>34</sup> The Council believed this action was necessary to achieve the reduction goal of 60 to 80 percent by 2050. The Council established a reduction target of 30 percent in 2020, provided there is a commitment to similar targets by other developed and industrialised countries.<sup>35</sup> During the period between 2007 and 2009, the Netherlands focused on a reduction policy of 30 percent by 2020. However, during proceedings, the State had noted that the Netherlands current reduction policy was only 14 to 17 percent in 2020.<sup>36</sup>

The Court then determined that the Netherlands' target for 2020 is below the 25 to 40 percent standard deemed necessary by climate science. Therefore, the Dutch government was not implementing the reduction targets necessary to achieve the 2° celcius target.<sup>37</sup> The State argued that the current Dutch target of 17 percent was sufficient in light of the European Union's plan to implement a 40 percent reduction by 2030. This new target for 2030 would allow for the achievement of the 80 to 95 percent reduction by 2050, which would adequately contribute to achieving the 2° celcius target.<sup>38</sup> The Court rejected this reasoning as the result of the lower target would mean, on balance, the release of more GHG into the atmosphere than would be if the emissions were reduced by 25 percent or more by 2020.<sup>39</sup> As

---

<sup>33</sup> Ibid [4.23].

<sup>34</sup> Ibid [4.25].

<sup>35</sup> Carlos Moedas, 'The Climate Change Challenge' (Speech delivered at the European Parliament) Brussels, 4 November 2014.

<sup>36</sup> *Urgenda Foundation v Kingdom of the Netherlands* [2015] Case C/09/456689/HA ZA 13 1396 [4.27].

<sup>37</sup> Ibid [4.31].

<sup>38</sup> Ibid [4.32].

<sup>39</sup> Ibid [4.85].

such, the Court concluded that the reduction target of 25 to 40 percent was the only acceptable option, as the standard that is currently accepted in climate science.<sup>40</sup>

### E *The State's legal obligation*

The second major question brought before the Court was whether the State has a legal obligation to Urgenda. The Dutch Constitution in art 21, imposes a duty of care on the State.<sup>41</sup> This duty is in relation to the livability, protection and improvement of the living environment.<sup>42</sup> The Court based the answer to this question on the 'open standard' of the *Dutch Civil Code*.<sup>43</sup> As a result, the Court acknowledged the discretionary powers of the State regarding the climate change policy.<sup>44</sup>

The Court then shifted its attention to the 'no harm' principle, a principle which provides that no State has the right to use its territory to cause damage to other States.<sup>45</sup> The Court recognised that this principle does not have a binding force with respect to private citizens and legal persons,<sup>46</sup> but provided that the State is intended to be motivated to meet its international obligations. As such, when applying and interpreting national law standards and concepts, the Court takes account of such international law obligations. The Court called this the 'reflex effect' in national law.<sup>47</sup> Hence the stipulations

---

<sup>40</sup> Ibid [4.34].

<sup>41</sup> *The Constitution of the Kingdom of the Netherlands* (Netherlands) art 21.

<sup>42</sup> *Urgenda Foundation v Kingdom of the Netherlands* [2015] Case C/09/456689/HA ZA 13 1396 [4.36].

<sup>43</sup> *Civil Code of the Netherlands* (Netherlands) Book 6, s 162.

<sup>44</sup> *Urgenda Foundation v Kingdom of the Netherlands* [2015] Case C/09/456689/HA ZA 13 1396 [4.53].

<sup>45</sup> United Nations Conference on the Human Environment 'Declaration of the United Nations Conference on the Human Environment' (1972) Stockholm, Sweden.

<sup>46</sup> *Urgenda Foundation v Kingdom of the Netherlands* [2015] Case C/09/456689/HA ZA 13-1396 [4.39].

<sup>47</sup> Ibid [4.43].

included in the various climate treaties and the ‘no harm’ principle must be taken into account when determining the State’s duty of care.

The Court, when assessing whether the State’s current climate policy breached the rights of Urgenda, considered whether Urgenda itself could be designated a victim. This is because, unlike a natural person, the physical integrity of a legal person cannot be violated.<sup>48</sup> As a result, Urgenda, in its own capacity, could not rely on arts 2 and 8 of the ECHR.<sup>49</sup> However, the Court held that the interpretation offered by the European Court of Human Rights in arts 2 and 8 of the ECHR was relevant:

[B]oth articles and their interpretation given by the ECtHR, particularly with respect to environmental right issues, can serve as a source of interpretation when detailing and implementing open private-law standards in the manner described above, such as the unwritten standard of care of Book 6, Section 162 of the Dutch Civil Code...<sup>50</sup>

The Court concluded that there could not be a legal obligation derived from art 21 of the Dutch Constitution, the ‘no harm’ principle, or the UN Climate Change Conventions.<sup>51</sup> Even though it was not possible for Urgenda to obtain rights from these sources, the Court deemed that they are still relevant when answering the question of whether the State has failed in its duty of care to Urgenda.<sup>52</sup> The Court therefore also considered the objectives and principles of international climate change policy and principles.

---

<sup>48</sup> Ibid [4.45].

<sup>49</sup> *European Convention on Human Rights*, opened for signature 4 November 1950, (entered into force 3 September 1953) arts 4, 8.

<sup>50</sup> *Urgenda Foundation v Kingdom of the Netherlands* [2015] Case C/09/456689/HA ZA 13–1396 [4.46].

<sup>51</sup> Ibid [4.52].

<sup>52</sup> Ibid [4.52].

Urgenda relied mostly on the Kelderluik<sup>53</sup> ruling of the Supreme Court<sup>54</sup>. Urgenda also relied on the principle of hazardous negligence, which detailed the requirement to act with due care towards society.<sup>55</sup> According to the Court, the other principles involved in the case include the precautionary principle, the fairness principle and the sustainability principle found in art 3 of the UNFCCC.<sup>56</sup> The Court held:

The principle of fairness means that the policy should not only start from what is most beneficial to the current generation at this moment, but also what this means for future generations, so that future generations are not exclusively and disproportionately burdened with the consequences of climate change.<sup>57</sup>

The fairness principle also places emphasis on the leadership of industrialised countries. As most of their processes involve the use of fossil fuels, it is believed they are better placed to combat climate change.<sup>58</sup> The Court also considered the TFEU<sup>59</sup> which includes a number of relevant principles, such as the high protection principle and the precautionary principle.<sup>60</sup>

The Court reiterated that the above objectives and principles were important when assessing whether the State acted wrongfully towards Urgenda. The Court stated that in determining the requisite duty of care, the following could be taken into account:

1. the nature and extent of the damage ensuing from climate change;
2. the knowledge and foreseeability of this damage;
3. the chance that hazardous climate change will occur;
4. the nature of the acts (or omissions) of the State;

---

<sup>53</sup> HR 5 November 1965, ECLI: NL: HR: 1965: AB7079, NJ 1966, 136.

<sup>54</sup> Ibid 454.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> *Urgenda Foundation v Kingdom of the Netherlands* [2015] Case C/09/456689/HA ZA 13-1396 [4.57].

<sup>58</sup> Ibid.

<sup>59</sup> Ibid [4.61].

<sup>60</sup> Ibid [4.60].

5. the onerousness of taking precautionary measures;
6. the discretion of the State to execute its public duties — with due regard for the public-law principles, all this in light of:
  - a. the latest scientific knowledge;
  - b. the available (technical) option to take security measures; and
  - c. the cost-benefit ratio of the security measures to be taken.<sup>61</sup>

Regarding the first three factors, the Court decided that they were in fact a result of the established science brought before the Court. The current global emissions targets were considered insufficient to achieve the 2° celcius reduction target and therefore the chances of dangerous climate change were determined to be high.<sup>62</sup> As such, the State was obliged to take measures to reduce climate change in light of the serious consequences that would result for the Netherlands and the world as a whole.<sup>63</sup> The Court also recognised that the mitigation of climate change must occur expeditiously as the GHG levels would have reached such high numbers that meeting the target after 2030 would be all but impossible.<sup>64</sup>

When considering the fifth factor of ‘the onerousness of taking precautionary measures’, the Court considered that the State had originally taken a 30 percent reduction target for 2009, a target which the 2009 cabinet argued was necessary on the basis of science to keep the 2° celcius target within reach.<sup>65</sup> The 2010 cabinet later decided to reduce the 30 percent reduction target without relying on any scientific knowledge or cost considerations.<sup>66</sup> The Court further pointed to the fact that other developed EU countries such as Denmark and the United Kingdom adopted targets within the 25 to

---

<sup>61</sup> Ibid [4.63].

<sup>62</sup> Ibid [4.65].

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid [4.70].

<sup>66</sup> Ibid [4.71].

40 percent range.<sup>67</sup> Based on these considerations, it was concluded that there was no cost or scientific consideration to prevent the State from adhering to the strict reduction target.<sup>68</sup> Furthermore, the Court found that taking immediate action would be more cost effective.<sup>69</sup>

When dealing with the fourth and sixth factors, the Court rejected the argument that the State does not produce any GHG, and as such, cannot be seen as one of the causes of climate change.<sup>70</sup> Firstly, the Court referred to art 21 of the Dutch Constitution which places a duty of care on the State to protect and improve the environment.<sup>71</sup> Secondly, the Court considered that the State has the power to exercise effective controls over emissions and where the State is a signatory of the United Nations Framework Convention on Climate Change and the Kyoto Protocol, the State accepts responsibility for the national production of emissions.<sup>72</sup> The Court also rejected the argument out forward by the State that a reduction of Dutch emissions would have a minimal effect on global levels.<sup>73</sup> The fact that every single emission contributes to climate change is the reason why the reduction targets are both joint and individual responsibility.<sup>74</sup>

The Court looked to the principle of fairness, which provides that the State, in choosing which measures to implement, must take into account the distribution of the cost between current and future generations.<sup>75</sup> On balance, it is more cost effective to act now; the State owes a duty of care to future generations and must act

---

<sup>67</sup> Ibid [4.73].

<sup>68</sup> Ibid [4.75].

<sup>69</sup> Ibid [4.82].

<sup>70</sup> Ibid [4.66].

<sup>71</sup> *The Constitution of the Kingdom of the Netherlands* (Netherlands) art 21.

<sup>72</sup> *Urgenda Foundation v Kingdom of the Netherlands* [2015] Case C/09/456689/HA ZA 13-1396 [4.74].

<sup>73</sup> Ibid [4.76].

<sup>74</sup> Ibid.

<sup>75</sup> Ibid [4.76].

accordingly.<sup>76</sup> The Court also considered the fact that the only effective way to combat climate change is to reduce GHG.<sup>77</sup>

The Court concluded that, as there is no other solution other than the reduction of GHG emissions, a greater and more serious the danger would have the effect of diminishing the State's discretionary powers. The Court concluded that the State is within its rights to deliberate and choose an appropriate reduction target within the 25 to 40 percent range.<sup>78</sup>

### F *The separation of power*

The third issue before the Court was the separation of powers. The State argued that climate policy is a political issue, and as such it was not a matter for an unelected judge to rule on.<sup>79</sup> The Court held that the Dutch system, unlike other jurisdictions<sup>80</sup>, had no complete separation of powers.<sup>81</sup> The Court considered that it would be better to describe the relationship between the different bodies so as to achieve a balance between the State authorities. The Court pointed out that even though judges are not elected, they do possess democratic legitimacy as their power and authority result from democratically established legislation, which gives them the authority to deliberate on issues that even concern the government.<sup>82</sup> The Court also noted that the task of providing protection from State authorities mainly falls with judges and by performing this duty, the Courts do not enter into the domain of politics.<sup>83</sup> The Court also noted that Courts must separate themselves from any political agenda, while

---

<sup>76</sup> Ibid.

<sup>77</sup> Ibid [4.75].

<sup>78</sup> Ibid [4.86].

<sup>79</sup> Ibid [4.97].

<sup>80</sup> This is unlike many Commonwealth countries such as the United Kingdom and Australia, with complete separation of powers.

<sup>81</sup> *Urgenda Foundation v Kingdom of the Netherlands* [2015] Case C/09/456689/HA ZA 13–1396 [4.97].

<sup>82</sup> Ibid [4.95].

<sup>83</sup> Ibid [4.96].

also limiting themselves to their own legal domain.<sup>84</sup> The Court stressed that even though a decision may have a political support base, this should not curb the judge in their task and authority.<sup>85</sup>

Lastly, the Court had to deal with the argument put forward by the State that in allowing the claim, the Netherlands negotiating position at the coming UNFCCC conference would be damaged.<sup>86</sup> The Court decided that there would not be independent significance as the decision of the Court would oblige the State to endeavour to realise a certain target. As a result, the State would be unable to disregard that obligation in the context of international negotiations.<sup>87</sup>

### III THE SIGNIFICANCE OF THE CASE

It should be noted that the Dutch government appealed the decision on 23 September 2015 and the State has since raised its 2020 target to 25 percent. While the decision is not binding in other jurisdictions, it does raise the question whether it can be replicated. This case has the potential to open the door for different parties to bring actions against not only public authorities, but also private entities deemed to be polluters. However, such actions might have a difficult time establishing a link between the GHG emissions and the related harms. This case raises concerns over the creation of a snowball effect which may bring about a string of actions in other jurisdictions. This would be an interest to larger multinational corporations who would see this as an issue for increased government regulation. The reintroduction of a carbon trading style of systems would be something that the Government might consider. As public sentiment towards climate change grows, the issue of whether the government owes a duty of care to its citizens will take an even larger role.

---

<sup>84</sup> Ibid [4.97].

<sup>85</sup> Ibid [4.98].

<sup>86</sup> Ibid [2.68].

<sup>87</sup> Ibid [4.100].

**Moot**

**THE TWENTY-THIRD ANNUAL WILLEM C. VIS  
INTERNATIONAL COMMERCIAL ARBITRATION MOOT,  
2015–2016**

BENJAMIN TENG, MADELINE RODGERS, MATTHEW  
PATERSON, SAMUEL BULLEN, SANGEETHA BADYA AND  
GABRIËL MOENS

The Annual Willem C. Vis International Commercial Arbitration Moot was established in 1993. The Moot was named after Willem C. Vis (1924–1993) who was a world-recognised expert in international commercial transactions and a dispute settlement expert. The Moot brings together students from diverse cultures through a common endeavour: the training of law leaders of tomorrow in principles of international commercial law and techniques of international commercial arbitration. The Moot is held at the Juridicum (the Faculty of Law) of the University of Vienna and at number of international law firms in Vienna. The Moot is supported by various international commercial arbitration institutions, including the International Chamber of Commerce ('ICC'), the Singapore International Arbitration Centre ('SIAC'), the London Court of International Arbitration ('LCIA'), the Hong Kong International Arbitration Centre ('HKIAC') and the Australian Centre for International Commercial Arbitration ('ACICA').<sup>1</sup> The Moot is organised by the Association for the Organisation and Promotion of the Willem C. Vis International Commercial Arbitration Moot. The founding Director of the Moot was Emeritus Professor Eric Bergsten, who is also a Member of the International Editorial Board of this Review. The Association has delegated the organisation of the Moot to appointed directors. In 2003, a sister Moot, the Willem C. Vis (East) Moot was established in Hong Kong.<sup>2</sup> The Hong Kong Moot is organised by The Chartered Institute of Arbitrators (East Asia Branch).

---

<sup>1</sup> The website of the Annual Willem C Vis International Commercial Arbitration Moot is: <<https://vismoot.pace.edu>>.

<sup>2</sup> The website of the Vis Moot (East) is: <[www.cisgmoot.org](http://www.cisgmoot.org)>.

The Moot, which is organised annually, welcomes teams representing law schools throughout the world. In the twenty-third Moot in 2015–2016, 311 law school teams from 72 countries participated. Around 2000 students were members of the teams. These students drafted two memoranda (one for the Claimant and one for the Respondent) which were judged by more than 800 lawyers and professors.

The Moot stimulates the study of international commercial law, especially the United Nations Convention on Contracts for the International Sale of Goods, 1980 ('CISG') and various arbitration rules. In the 23<sup>rd</sup> Moot, the Vienna International Arbitration Centre Rules of Arbitration of 1 July 2013 (VIAC Rules) were used as the procedural arbitration rules. The Moot offers participants an opportunity to interpret these texts in the light of different legal systems and to develop an expertise in advocating a position before an arbitral panel composed of arbitrators from different legal systems.<sup>3</sup>

The Moot Problem concerns an international trade transaction between a buyer and seller, who have their places of business in different states which have ratified the CISG. A dispute which arises out of the transaction is submitted to an arbitral tribunal for resolution in accordance with the arbitration rules of one of the supporting arbitral institutions and the CISG. The application of this Convention concerns many legal (as well as ethical) issues, for example, the meaning of performance of the contract in "good faith". As the dispute is based on one transactional problem which replicates approaches used in the resolution of real-life problems, the Moot is as an example of project-based learning ('PBL').<sup>4</sup>

---

<sup>3</sup> The goals of the Moot are described in Volumes II and III of *International Trade and Business Law Annual* (1996) 2 ITBLA 229; (1997) 3 ITBLA 277.

<sup>4</sup> Problem Based Learning (PBL) is a term used to describe an approach to teaching the curriculum of any discipline. The principal idea behind PBL is that students' learning should be based on carefully designed problems that facilitate the acquisition of critical knowledge and enhances students' problem-solving skills. The PBL approach

Participating students are required to draft two sophisticated memoranda and to participate in simulated arbitration hearings, held in Vienna in the week before Easter or, in the case of the Willem C. Vis (East) Moot, either the week before or after the Vienna Moot, in Hong Kong.

Rule 3 of the Moot Rules emphatically declares that, “The Moot is designed to be an educational program with many facets in the form of a competition. It is not intended to be a competition with incidental educational benefits”. This Rule indicates that the principal purpose of the Moot is to provide educational benefits to participating students. However, the Moot is both an educational event as well as a competition. Many of the better teams certainly consider the Moot as a competitive vehicle, success in which will bring glory and prestige to the participating students and their law schools.

In the period 1994–2002, the teams of the T.C. Beirne School of Law of The University of Queensland obtained the number one ranking in the world on several occasions (i.e. they achieved the highest mark awarded in the preliminary four hearings); they reached the Grand Final four times, and they actually won this prestigious event twice. Consequently, many international opportunities, including offers of lucrative employment in Australia and overseas, opened up for the members of the University of Queensland teams. However, the University discontinued its participation in 2003, following the departure of Professor Moens, who had been coaching the teams. As from 2011, Moens also coached student teams from the City

---

shifts responsibility for learning onto the students and away from the teachers. “In problem-based learning (PBL) courses, students work with classmates to solve complex and authentic problems that help develop content knowledge as well as problem-solving, reasoning, communication, and self-assessment skills. These problems also help to maintain student interest in course materials because students realize that they are learning the skills needed to be successful in the field.” (*Speaking of Teaching*, Stanford University Newsletter on Teaching, Winter 2001, Vol 11, No. 1, 1 available at:

[www.web.stanford.edu/dept/CTL/cgi-bin/docs/newsletter/probem\\_based\\_1arning.pdf](http://www.web.stanford.edu/dept/CTL/cgi-bin/docs/newsletter/probem_based_1arning.pdf)) (accessed on Tuesday, 23 June 2015).

University of Hong Kong, which proceeded to the Grand Finals in Hong Kong (2011 and 2012) and Vienna (2013), winning in Hong Kong in 2012 and in Vienna in 2013. Following an absence of 13 years, the University of Queensland decided to participate in the 22<sup>nd</sup> Moot which was held in Vienna in April 2015 and in the 23<sup>rd</sup> Moot held in March 2016.

In the next section, the Review publishes the Memorandum for the Respondent, submitted by the T C Beirne School of Law team (The University of Queensland) in the 23<sup>rd</sup> Moot. This Memorandum won an Honourable Mention at the Awards ceremony in Vienna. In addition, the Memorandum for the Claimant also won an Honourable Mention. The speakers, Benjamin Teng and Samuel Bullen, met the University St. Cyril and Methodius, China University of Political Science and Law, Palacky University, and the University of Münster, Germany in the general rounds. The team proceeded to the elimination rounds (limited to the top 64 teams) and were beaten by the University of Belgrade, Serbia.

This Memorandum is a useful resource in the teaching of the CISG, and of international commercial arbitration law in general. It also serves as a historical record of the involvement of the T C Beirne School of Law in the 23<sup>rd</sup> Willem C. Vis International Commercial Arbitration Moot.

THE UNIVERSITY OF QUEENSLAND  
AUSTRALIA



23<sup>RD</sup> ANNUAL  
WILLEM C VIS INTERNATIONAL COMMERCIAL  
ARBITRATION MOOT

2015 - 2016

---

MEMORANDUM FOR THE RESPONDENT

---

**ON BEHALF OF:**

**AGAINST:**

**VINO VERITAS LTD**

**Kaihari Waina Ltd**

56 Merlot Road  
St Fundus  
Vuachoua  
Mediterraneo

12 Riesling Street  
Oceanside  
Equatoriana

—RESPONDENT—

—CLAIMANT—

---

BENJAMIN  
TENG

MADLINE  
RODGERS

MATTHEW  
PATERSON

SAMUEL  
BULLEN

SANGEETHA  
BADYA

## TABLE OF CONTENTS

<b>INTRODUCTION TO THE MOOT (GABRIEL MOENS)</b> .....	379
<b>INDEX OF ABBREVIATIONS</b> .....	388
<b>INDEX OF LEGISLATIVE MATERIALS</b> .....	390
<b>INDEX OF AUTHORITIES</b> .....	391
<b>INDEX OF CASES</b> .....	404
<b>INDEX OF ARBITRAL AWARDS</b> .....	412
<b>NOTE ON THE PREPARATION OF THIS MEMORANDUM</b> .....	419
<b>STATEMENT OF FACTS</b> .....	421
<b>ARGUMENTS</b> .....	423
<b>ARGUMENTS PART I</b> .....	424
<b>THE ARBITRAL TRIBUNAL DOES NOT HAVE THE POWER TO ORDER <i>VINO VERITAS</i> TO PRODUCE THE DOCUMENTS REQUESTED AND SHOULD NOT MAKE SUCH AN ORDER</b> .....	424
A. THE PRODUCTION OF THE TYPE OF DOCUMENTS REQUESTED IS INCONSISTENT WITH THE LAW OF THE ARBITRAL SEAT AND THE FRAMEWORK AGREEMENT .....	425
1. The Arbitration Agreement expressly prohibits document production of the kind requested by Kaihari .....	425
(i) <i>VINO VERITAS</i> neither knew nor could have been aware of <i>KAIHARI</i> 's intended meaning of 'discovery' .....	426

(ii)	Alternatively, a reasonable person in <i>VINO VERITAS</i> ' position would have understood the preclusion of discovery to extend to all kinds of document production .....	427
2.	The relevant procedural law does not authorise the Arbitral Tribunal to order the production of the documents requested .....	429
(i)	The VIAC Rules and the Model Law are limited by the Agreement of the Parties to exclude 'discovery' .....	429
(ii)	Alternatively, an order accepting <i>KAIHARI</i> 's request for document production would be contrary to the efficiency of the proceedings [ <i>NEW ARGUMENT</i> ] .....	430
B.	<i>KAIHARI</i> HAS NOT SATISFIED THE REQUIREMENTS UNDER ARTICLE 3(7) INTERNATIONAL BAR ASSOCIATION RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION ('IBA RULES') .....	430
1.	The objections outlined in Article 9(2) IBA Rules apply .....	431
2.	The requirements of Article 3(3) IBA Rules are not satisfied .....	431
(i)	<i>KAIHARI</i> 's request is not sufficiently narrow and specific .....	432
(ii)	<i>KAIHARI</i> 's request does not prove it had a reasonable belief in the existence of the documents at the time of its request .....	432
(iii)	<i>KAIHARI</i> has not proven that the documents it seeks are in the possession, custody or control of <i>VINO VERITAS</i> .....	433
C.	PURSUANT TO THE MODEL LAW AND THE VIENNA INTERNATIONAL ARBITRATION CENTRE RULES OF ARBITRATION ('VIAC RULES'), THE ARBITRAL TRIBUNAL SHOULD NOT ORDER <i>VINO VERITAS</i> TO PRODUCE THE DOCUMENTS REQUESTED BY <i>KAIHARI</i> .....	433

1.	The production of these documents is not required to ensure Kaihari’s right to equal treatment .....	434
	(i) Refusing <i>KAIHARI</i> ’s request would not be contrary to its right to equal treatment.....	434
	(ii) Granting <i>KAIHARI</i> ’s request would deny <i>VINO VERITAS</i> ’ right to equal treatment.....	435
2.	The production of these documents is not necessary to ensure Kaihari’s right to be heard .....	435
	(i) <i>KAIHARI</i> bears the burden to prove its own losses [NEW ARGUMENT].....	43
	(ii) <i>KAIHARI</i> has failed to discharge its burden and cannot rely on an alleged violation of its rights [NEW ARGUMENT].....	436

**ARGUMENTS PART II ..... 437**

***KAIHARI* IS NOT ENTITLED TO THE DAMAGES CLAIMED FOR ITS LITIGATION COSTS OF US\$50,280.00 ..... 437**

A.	LITIGATION COSTS, AS A MATTER OF LAW, ARE NOT RECOVERABLE AS DAMAGES UNDER THE CISG.....	437
	1. The availability of litigation costs is governed by the relevant domestic procedural law .....	437
	2. The right to full compensation is not consistent with an award of litigation costs .....	438
	3. Pre-litigation costs are not available under the CISG .....	439
B.	<i>KAIHARI</i> IS NOT ENTITLED TO RECOVER DAMAGES FOR ITS APPLICATION FOR AN INTERIM INJUNCTION .....	440
	1. An interim injunction is not a measure of mitigation under the CISG.....	440
	2. Kaihari’s application for an interim injunction was not necessary to mitigate its loss .....	441
	3. The losses Kaihari incurred in its application for interim relief were not foreseeable .....	442

C. <i>KAIHARI</i> CANNOT RECOVER THE LITIGATION COSTS IT INCURRED IN ITS DEFENCE OF THE DECLARATORY PROCEEDINGS .....	442
1. The Arbitration Agreement is exclusively governed by the Model Law and the CISG, not the UNIDROIT Principles	443
2. The Arbitration Agreement is not governed by Article 74 CISG and so damages are not available for its breach.....	443
(i) The CISG was not intended to override domestic procedural law governing the allocation of legal fees for the breach of an arbitration agreement [NEW ARGUMENT]	
(ii) Overturning the decision pertaining to costs of the High Court of Mediterraneo would be contrary to the principle of <i>res judicata</i> [NEW ARGUMENT] ..	445
3. The losses Kaihari incurred were a consequence of its own conduct .....	445
(i) <i>VINO VERITAS</i> is exempt from liability under Article 80 CISG [NEW ARGUMENT].....	446
(ii) <i>KAIHARI</i> did not fulfill its obligation to mitigate its damages pursuant to Article 77 CISG .....	448
D. THE CONTINGENCY FEES <i>KAIHARI</i> INCURRED WERE NOT REASONABLY FORESEEABLE.....	449

**ARGUMENTS PART III .....** 450

***KAIHARI* CANNOT CLAIM THE PROFITS MADE BY *VINO VERITAS*, INCLUDING FURTHER PROFITS, FROM ITS SALE TO *SUPERWINES* AS PART OF ITS DAMAGES.....** 450

A. <i>KAIHARI</i> 'S CLAIMED LOSSES DO NOT MEET THE ARTICLE 74 CISG REQUIREMENTS FOR DAMAGES TO BE AWARDED.....	451
1. Kaihari's alleged lost profits cannot be claimed as damages under the CISG.....	451
(i) It is uncertain whether <i>KAIHARI</i> suffered lost profits.....	452
(ii) It is uncertain whether <i>KAIHARI</i> suffered lost future profits.....	452

2.	The losses suffered by Kaihari were not foreseeable.....	453
(i)	The ‘special circumstances’ of the case do not make <i>KAIHARI</i> ’s losses foreseeable.....	455
a.	<i>VINO VERITAS</i> ’ experience in the industry is not relevant in assessing foreseeability in this case .....	455
b.	It was not foreseeable to <i>VINO VERITAS</i> that <i>KAIHARI</i> would be able to resell the goods [ <i>NEW ARGUMENT</i> ]....	455
(ii)	<i>VINO VERITAS</i> obliging <i>KAIHARI</i> ’s request for a written Framework Agreement is not indicative of the foreseeability of <i>KAIHARI</i> ’s losses.....	456
B.	EVEN IF IT WERE APPROPRIATE FOR <i>KAIHARI</i> TO CLAIM DAMAGES, <i>KAIHARI</i> CANNOT CLAIM THE ADDITIONAL PROFIT <i>VINO VERITAS</i> MADE THROUGH ITS SALE TO <i>SUPERWINES</i> .....	457
1.	The principle of full compensation does not support an award of the kind or quantity of damages Kaihari is seeking.....	458
2.	Allowing Kaihari to claim a disgorgement of profits would unjustly enrich Kaihari, not VINO VERITAS .....	458
(i)	The CISG does not, in these circumstances, allow an award of damages to be made on the basis of unjust enrichment .....	458
(ii)	Even if it were available in principle, <i>VINO VERITAS</i> was not unjustly enriched by its transaction with <i>SUPERWINES</i> .....	459
(iii)	Such an award would unjustly enrich <i>KAIHARI</i> [ <i>NEW</i> <i>ARGUMENT</i> ] .....	459
3.	As a matter of law, there is a general resistance to the awarding of damages in the form of a disgorgement of profits [New Argument] .....	460
4.	A disgorgement of VINO VERITAS’ profits from its sale to SuperWines is particularly inappropriate .....	462
(i)	A disgorgement in this circumstance would be punitive in nature.....	462

(ii) This request for a disgorgement is inconsistent with  
Article 7(1) CISG ..... 462

**PRAYER FOR RELIEF..... 4**



## **Index of Abbreviations**

<b>ABBREVIATION</b>	<b>MEANING</b>
<i>Ans. St. Cl.</i>	Answer to Statement of Claim
<i>Art.</i>	Article
<i>BGH</i>	Bundesgerichtshof
<i>CEO</i>	Chief Operating Officer
<i>Cl. Memo.</i>	Memorandum for the Claimant
<i>CLOUT</i>	Case Law on UNCITRAL Texts
<i>Co.</i>	Company
<i>Corp.</i>	Corporation
<i>Ex. C</i>	Claimant's Exhibit
<i>Ex. R</i>	Respondent's Exhibit
<i>ICC</i>	Court of Arbitration of the International Chamber of Commerce
<i>ICSID</i>	International Centre for Settlement of Investment Disputes
<i>Inc.</i>	Incorporated

---

<i>LG</i>	Landgericht
<i>Ltd.</i>	Limited
<i>No.</i>	Number
<i>OGH</i>	Oberster Gerichtshof
<i>OLG</i>	Oberlandesgericht
<i>Para.</i>	Paragraph
<i>Proc. Ord.</i>	Procedural Order
<i>Pty</i>	Proprietary
<i>Rd</i>	Road
<i>St</i>	Street
<i>St. Cl.</i>	Statement of Claim
<i>UN</i>	United Nations
<i>UNCITRAL</i>	United Nations Commission on International Trade Law
<i>UNCTAD</i>	United Nations Conference on Trade and Development
<i>US</i>	United States of America

---

---

*Vol.*

Volume

---

**Index of Legislative Materials**

---

**CITED AS**

**CITATION**

---

*CISG*

United Nations Convention on Contracts for the International Sale of Goods (1980)

---

*Federal Court Rules 2011*

Federal Court Rules 2011 (Australia)

---

*IBA Rules*

International Bar Association Rules on the Taking of Evidence in International Arbitration of 29 May 2010

---

*Moot Rules*

The Rules of the Twenty Third Willem C. Vis International Commercial Arbitration Moot

---

*New York Convention*

United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York (1958)

---

*UNIDROIT Principles*

International Institute for the Unification of Private Law Principles of International Commercial Contracts (2010)

---

<i>Model Law</i>	UNCITRAL Model Law on International Commercial Arbitration (as adopted by UNCITRAL on 21 June 1985 and as amended by UNCITRAL on 7 July 2006)
<i>Practice Note CM5</i>	Federal Court of Australia - Practice Note CM5: Discovery
<i>VIAC Rules</i>	Vienna International Arbitration Centre Rules of Arbitration of 1 July 2013

### **Index of Authorities**

<b>CITED AS</b>	<b>CITATION</b>	<b>CITED AT</b>
<i>Aygül/Gültutan</i>	Aygül, Musa; Gültutan, Doğan <i>Arbitration in Turkey</i> Kluwer Law International (2015)	¶ 46
<i>Beharry</i>	Beharry, Christina <i>Objections to Requests for Documents in International Arbitration</i> In: 27 ICSID Review 33 (2012)	¶ 36
<i>Bianca/Bonell</i>	Bianca, Cesare; Bonell, Michael Joachim <i>Commentary on the International Sales Law: The 1980 Vienna Sales Convention</i> Fred B Rothman & Co (1987)	¶ 20, 59, 66, 108, 137, 139

<i>Bishop/Crawford</i>	Bishop, Doak; Crawford, James <i>Foreign Investment Disputes: Cases, Materials and Commentary (Second Edition)</i> Kluwer Law International (2014)	¶ 52
<i>Born</i>	Born, Gary <i>International Commercial Arbitration (Vol II)</i> Wolters Kluwer Law & Business (2014)	¶ 45, 46, 51
<i>Brekoulakis/ Ribeiro</i>	Brekoulakis, Stavros; Ribeiro, John <i>Concise International Arbitration (Second Edition)</i> Kluwer Law International (2015)	¶ 45
<i>Bridge</i>	Bridge, Michael <i>The International Sale of Goods</i> Oxford University Press (2013)	¶ 137
<i>Chambers/ Mitchell/Penner</i>	Chambers, Robert; Mitchell, Charles; Penner, James <i>Philosophical Foundations of the Law of Unjust Enrichment</i> Oxford University Press (2009)	¶ 130
<i>CISG Advisory Council</i>	CISG Advisory Council Opinion No. 6 <i>Calculation of Damages under CISG Article 74</i> Pace Law School Institute of International Commercial Law (2006)	¶ 57, 59, 60, 125, 139

<i>Cook</i>	Cook, Susanne <i>The UN Convention on Contract for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentricity</i> In: 16 Journal of Law and Commerce 257 (1997)	¶ 113
<i>Degeling/Edelman</i>	Degeling, Simone; Edelman, James <i>Unjust Enrichment in Commercial Law</i> Thompson Reuters (2008)	¶ 130
<i>Draetta</i>	Draetta, Ugo <i>The Transnational Procedural Rules for Arbitration and the Risks of Overregulation and Bureaucratization</i> In: 33 ASA Bulletin Issue 2 327 (2015)	¶ 47
<i>Felemegas</i>	Felemegas, John <i>An International Approach to the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law</i> Cambridge University Press (2013)	¶ 57, 62, 102
<i>Ferrari, 1999</i>	Ferrari, Franco <i>CISG Case Law: A New Challenge for Translators?</i> In: 17 Journal of Law and Commerce 245 (1999)	¶ 136

<i>Ferrari, 2009</i>	Ferrari, Franco <i>Homeward Trend and Lex Forism Despite Uniform Sales Law</i> In: 13 Vindobona Journal of International Commercial Law & Arbitration 15 (2009)	¶ 113
<i>Flechtner</i>	Flechtner, Harry <i>Recovering Attorneys' Fees as Damages Under the U.N. Sales Convention: A Case Study on the New International Practice and the Role of Case Law in CISG Jurisprudence, With Comments on Zapata Hermanos Sucesores, S.A v. Hearthside Baking Co.</i> In: 22 Northwestern Journal of International Law & Business 121 (2002)	¶ 62
<i>Gabriel</i>	Gabriel, Henry <i>Contract for the Sale of Goods, A Comparison of US and International Law</i> Oxford University Press (2009)	¶ 19
<i>Gotanda</i>	Gotanda, John <i>Recovering Lost Profits in International Disputes</i> In: 36 Georgetown Journal of International Law 61 (2004)	¶ 128

<i>Holtzmann/ Neuhaus</i>	Holtzmann, Howard; Neuhaus, Joseph <i>A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary</i> Kluwer Law and Taxation Publishers (1989)	¶ 45
<i>Honnold</i>	Honnold, John <i>Uniform Law for International Sales under the 1980 United Nations Convention: Fourth Edition</i> Kluwer Law International (2009)	¶ 27, 61, 142
<i>The IBA Working Party</i>	The IBA Working Party <i>Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration</i> International Bar Association (2010)	¶ 40, 48
<i>Keily</i>	Keily, Troy <i>How does the cookie crumble? Legal costs under a uniform interpretation of the United Nations Convention on Contracts for the International Sale of Goods</i> In: 1 Nordic Journal of Commercial Law (2003)	¶ 62
<i>Klein</i>	Klein, John <i>Good Faith in International Transactions</i> In: 15 Liverpool Law Review 115 (1993)	¶ 87

<i>Koch</i>	<p>Koch, Robert</p> <p><i>The CISG as the Law Applicable to Arbitration Agreements</i></p> <p>In: Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday 267 (2008)</p>	¶ 78, 81
<i>Koneru</i>	<p>Koneru, Phanesh</p> <p><i>International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles</i></p> <p>In: 6 Minnesota Journal of Global Trade 105 (1997)</p>	¶ 128
<i>Kouladis</i>	<p>Kouladis, Nicholas</p> <p><i>Principles of Law Relating to International Trade</i></p> <p>Springer Science + Business Media Inc. (2006)</p>	¶ 27
<i>Lookofsky</i>	<p>Lookofsky, Joseph</p> <p><i>Consequential Damages in CISG Context</i></p> <p>In: 19 Pace International Law Review 63 (2007)</p>	¶ 57
<i>Ly/Sheppard</i>	<p>Ly, Filip De; Sheppard, Audley</p> <p><i>Berlin Conference International Commercial Arbitration</i></p> <p>International Law Association (2004)</p>	¶ 82

<i>Marghitola</i>	Marghitola, Reto <i>Document Production in International Arbitration</i> Kluwer Law International (2015)	¶ 33, 45
<i>Moses</i>	Moses, Margaret <i>The Principles and Practice of International Commercial Arbitration</i> Cambridge University Press (2008)	¶ 14
<i>Murray</i>	Murray, John <i>The Neglect of CISG: A Workable Solution</i> In: 17 Journal of Law and Commerce 365 (1998)	¶ 113
<i>Neumann</i>	Neumann, Thomas <i>Shared Responsibility under Article 80 CISG</i> In: 2/22 Nordic Journal of Commercial Law (2009)	¶ 86
<i>Neyers/McInnes/Pitel</i>	Neyers, Jason; McInnes, Mitchell; Pitel, Stephen <i>Understanding Unjust Enrichment</i> Hart Publishing (2004)	¶ 130, 136
<i>Opie</i>	Opie, Elisabeth <i>Commentary on the manner in which the UNIDROIT Principles may be used to interpret or supplement Article 77 of the CISG</i> Pace Law Institute of International Commercial Law (2005)	¶ 93

---

<i>Orlandi</i>	Orlandi, Chiara <i>Procedural Law Issues and Law Conventions</i> In: V Uniform Law Review 21 (2002)	¶ 80
<i>Redfern/Hunter</i>	Redfern, Alan; Hunter, Martin <i>Law and Practice of International Commercial Arbitration</i> Sweet & Maxwell (2004)	¶ 26
<i>Rivkin/Rowe</i>	Rivkin, David; Rowe, Samantha <i>The Role of the Tribunal in Controlling Arbitral Costs</i> In: 81 The International Journal of Arbitration, Mediation and Dispute Management 116 (2015)	¶ 33
<i>Sachs/Lörcher</i>	Sachs, Klaus; Lörcher, Torsten <i>Arbitration in Germany: The Model Law in Practice</i> Kluwer Law International (2015)	¶ 36, 47, 48
<i>Saidov</i>	Saidov, Djakhongir <i>Causation in Damages: The Convention on Contracts for the International Sale of Goods, the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law</i> In: Review of the Convention on Contracts for the International Sales of Goods (CISG) 2004-2005 (2005)	¶ 107

---

<i>Saidov/ Cunnington</i>	Saidov, Djakhongir; Cunnington, Ralph <i>Contract Damages: Domestic and International Perspectives</i> Hart Publishing (2008)	¶ 59, 63
<i>Schlaepfer</i>	<i>Schlaepfer, Véronique</i> <i>Legitimacy: Myths, Realities, Challenges</i> In: 18 ICCA Congress Series 127 Kluwer Law International (2015)	¶ 53
<i>Schlechtriem</i>	Schlechtriem, Peter <i>Commentary on the UN Convention on the International Sale of Goods (CISG)</i> Oxford University Press (1998)	¶ 19, 20, 59, 90
<i>Schneider</i>	Schneider, Eric <i>Consequential Damages in the International Sale of Goods: Analysis of Two Decisions</i> In: 16 Journal of International Business Law 615 (1995)	¶ 62
<i>Schwenger/ Schlechtriem</i>	Schwenger, Ingeborg; Schlechtriem, Peter <i>Commentary on the UN Convention on the International Sale of Goods (CISG)</i> Oxford University Press (2010)	¶ 52, 125, 137

---

<i>Sica</i>	Sica, Lucia <i>Gap-filling in the CISG: May the UNIDROIT Principles Supplement the Gaps in the Convention?</i> In: 1 Nordic Journal of Commercial Law (2006)	¶ 133
<i>Takahashi</i>	Takahashi, Koji <i>Damages for Breach of a Choice-of-Court Agreement</i> In: 10 Yearbook of Private International Law 57 (2008)	¶ 82
<i>Tallon</i>	Tallon, Denis <i>Article 80</i> Pace Law Institute of International Commercial Law (1987)	¶ 86
<i>Trittman/ Kasolowsky</i>	Trittman, Rolf; Kasolowsky, Boris <i>Taking Evidence in Arbitration Proceedings Between Common Law and Civil Law Traditions - The Development of a European Hybrid Standard for Arbitration Proceedings</i> In: 31(1) UNSW Law Journal 330 (2008)	¶ 14

---

---

<i>Wirth/Rouvinez/ Knoll</i>	Wirth, Marcus; Rouvinez, Christina; Knoll, Joachim <i>The Search for 'Truth' in Arbitration: Is Finding the Truth What Dispute Resolution is About?</i> Juris Publishing Inc. (2011)	¶ 26
----------------------------------	--	------

---

<i>UNCITRAL Model Law Digest</i>	UNCITRAL <i>UNCITRAL 2012 Digest of Case Law on the Model Law on Commercial Arbitration</i> UNCITRAL (2012)	¶ 45, 51, 54
--------------------------------------	---	--------------

---

<i>UNCITRAL CISG Digest</i>	UNCITRAL <i>UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods</i> UNCITRAL (2012)	¶ 120
---------------------------------	---	-------

---

<i>Varady/Barcelo/ on Mehren</i>	Varady, Tibor; Barcelo, John; von Mehren, Arthur <i>International Commercial Arbitration</i> West Publishing (2009)	¶ 25
--------------------------------------	---	------

---

<i>von Goeler</i>	von Goeler, Jonas <i>Third-Party Funding in International Arbitration and its Impact on Procedure</i> In: 35 International Arbitration Law Library 367 (2016)	¶ 97, 98
-------------------	---	----------

---

<i>Wong</i>	Wong, Jarrod <i>Court or Arbitrator- Who Decides Whether Res Judicata Bars Subsequent Arbitration under the Federal Arbitration Act</i> In: 46 Santa Clara Law Review 1 (2005)	¶ 82
<i>Zeller, 2004</i>	Zeller, Bruno <i>Traversing International Waters</i> In: 78 Law Institute Journal 52 (2004)	¶ 61
<i>Zeller, 2009</i>	Zeller, Bruno <i>Damages under the Convention on Contracts for the International Sale of Goods</i> Oxford University Press (2009)	¶ 109, 113
<i>Ziegel</i>	Ziegel, Jacob <i>Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods</i> Pace Law Institute of International Commercial Law (1981)	¶ 90

## Index of Cases

CITED AS	CITATION	CITED AT
<b>AUSTRALIA</b>		
<i>Alanco Australia v Higgins (No. 2)</i>	<i>Alanco Australia v Higgins (No. 2)</i> 2011 Federal Court of Australia	¶ 23
<i>Farah Constructions v Say-Dee</i>	<i>Farah Constructions Pty. Ltd. v Say-Dee Pty. Ltd</i> 2011 High Court of Australia	¶ 135
<i>Pavey &amp; Matthews v Paul</i>	<i>Pavey &amp; Matthews Pty. Ltd. v Paul</i> 1987 High Court of Australia	¶ 135
<i>UWA v Gray</i>	<i>University of Western Australia v Gray (No. 8)</i> 2007 Federal Court of Australia	¶ 26
<b>AUSTRIA</b>		
<i>Conveyor Band Case</i>	<i>Conveyor Band Case</i> 23 March 2005 OLG Linz	¶ 27
<i>Cooling System Case</i>	<i>Cooling System Case</i> 14 January 2002 OGH CLOUT Case No. 541	¶ 108, 120

<i>Propane Case</i>	<i>Propane Case</i> 6 February 1996 OGH CLOUT Case No. 176	¶ 65, 86, 90, 93, 116
<b>CANADA</b>		
<i>Re Corporación Transnacional</i>	<i>Re Corporación Transnacional de Inversiones, S.A. de C.V. et al. and STET International, S.p.A. et al.</i> 22 September 1999 Ontario Superior Court of Justice CLOUT Case No. 391	¶ 45
<i>Desputeaux v. Éditions Chouette</i>	<i>Desputeaux v. Éditions Chouette (1987) Inc.</i> 21 March 2003 Supreme Court of Canada	¶ 14, 30
<i>Kerr v. Baranow</i>	<i>Kerr v. Baranow</i> 18 February 2011 Supreme Court of Canada	¶ 133
<i>Noble China</i>	<i>Noble China Inc. v. Lei Kat Cheong</i> 4 November 1998 Ontario Court of Justice	¶ 14, 30
<i>Rathwell v. Rathwell</i>	<i>Rathwell v. Rathwell</i> 19 January 1978 Supreme Court of Canada	¶ 135

<i>Xerox</i>	<i>Xerox Corporation Ltd. and Xerox Corporation</i> <i>vi MPI Technologies Inc. and MPI Tech SA</i> 30 November 2006 Ontario Superior Court of Justice	¶ 45
<b>ENGLAND</b>		
<i>Attorney-General v Blake</i>	<i>Attorney-General v Blake</i> 27 July 2000 House of Lords	¶ 136
<i>Fibrosa</i>	<i>Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd.</i> 1943 Court of Appeals	¶ 130
<i>Hadley v Baxendale</i>	<i>Hadley v Baxendale</i> 1854 Exchequer Court	¶ 113
<i>Hochtief Airport</i>	<i>ABB AG v Hochtief Airport</i> 8 March 2006 Commercial Court	¶ 51
<i>OAo Northern Shipping</i>	<i>OAo Northern Shipping Company v Remolcadores de Marin Sl</i> 27 July 2007 Court of Appeal, Commercial Court	¶ 51

<i>Sempra Metals</i>	<i>Sempra Metals Ltd. (formerly Metallgesellschaft v Inland Revenue Commissioners</i> 2007 House of Lords	¶ 135
<b>FINLAND</b>		
<i>Plastic Carpets Case</i>	<i>Plastic Carpets Case</i> 26 October 2000 Helsinki Court of Appeals	¶ 102
<b>GERMANY</b>		
<i>Automobiles Case</i>	<i>Automobiles Case</i> 8 February 1995 OLG München CLOUT Case No. 133	¶ 27, 90
<i>BGH NJW 2006 2847</i>	<i>BGH NJW 2006 2847</i> 5 July 2006 BGH	¶ 135
<i>Broadcasters Case</i>	<i>Broadcasters Case</i> 24 July 2009 OLG Celle	¶ 89
<i>Café Inventory Case</i>	<i>Café Inventory Case</i> 25 January 2008 OLG Hamburg	¶ 27
<i>Cereal Case</i>	<i>Cereal Case</i> 13 February 2013 OLG Naumberg	¶ 19

<i>Flagstone Tiles Case</i>	<i>Flagstone Tiles Case</i> 12 May 1995 LG Alsfeld CLOUT Case No. 410	¶ 65
<i>Generators Case</i>	<i>Generators Case</i> 30 January 2004 OLG Düsseldorf CLOUT Case No. 592	¶ 78
<i>Leather Goods Case</i>	<i>Leather Goods Case</i> Germany 9 July 1997 OLG München CLOUT Case No. 273	¶ 90
<i>Printed Work Case</i>	<i>Printed Work Case</i> 29 May 2012 LG Köln	¶ 20
<i>Tissue Machine Case</i>	<i>Tissue Machine Case</i> 15 May 2006 OLG Stuttgart	¶ 78
<i>Used Car Case</i>	<i>Used Car Case</i> 21 May 1996 OLG Köln	¶ 116
<i>Vine Wax Case</i>	<i>Vine Wax Case</i> 24 March 1999	¶ 93

---

BGH

---

**GREECE**

---

*Bullet-Proof Vest Case*      *Bullet-Proof Vest Case*      ¶ 120  
2009  
Multi-Member Court of First Instance of  
Athens

---

*Sunflower Seed Case*      *Sunflower Seed Case*      ¶ 66  
2006  
Court of Appeals of Lamia

---

**NETHERLANDS**

---

*Dried Apple Rings Case*      *Dried Apple Rings Case*      ¶ 20  
20 March 2013  
District Court Rotterdam

---

**SINGAPORE**

---

*Xinyi Group*      *Triulzi Cesare SRL v Xinyi Group (Glass)*      ¶ 34, 45  
*Co. Ltd.*  
30 October 2014  
High Court of Singapore

---

**SPAIN**

---

*Rolls of Rubber Case*      *Rolls of Rubber Case*      ¶ 19  
14 July 2010  
Cáceres Court of Appeals

---

**SWITZERLAND**

---

<i>CLOUT Case No. 877</i>	<i>CLOUT Case No. 877</i> 22 December 2000 Bundesgericht	¶ 19
<i>Packaging Machine Case</i>	<i>Packaging Machine Case</i> 9 February 2009 Bundesgericht	¶ 51
<b>UNITED STATES OF AMERICA</b>		
<i>ACS Consultant v. Williams</i>	<i>ACS Consultant Company Inc. v. Williams</i> 6 April 2006 Michigan Eastern District Court	¶ 26
<i>Filanto, S.p.A. v. Chilewich</i>	<i>Filanto, S.p.A. v. Chilewich International Corp.</i> 14 April 1992 US Southern District Court of New York	¶ 78
<i>Mitsubishi Motors</i>	<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.</i> 2 July 1985 US Supreme Court	¶ 45

<i>Sabaté USA</i>	<i>Chateau des Charmes Wines Ltd. v. Sabaté USA Inc.</i> 5 May 2003 US Circuit Court of Appeals. 9 <sup>th</sup> Circuit	¶ 78
<i>Zapata</i>	<i>Zapata Hermanos Sucesores, S.A v. Hearthside Baking Co.</i> 19 November 2002 US Circuit Court of Appeals, 7th Circuit	¶ 57, 62, 78, 81

---

### Index of Arbitral Awards

---

CITED AS	CITATION	CITED AT
----------	----------	----------

---

#### AMERICAN ARBITRATION ASSOCIATION

---

<i>Macromex Case</i>	<i>Macromex Srl. v Globex International Inc.</i> 2007 Case No. 50181T 0036406 Available At: <a href="http://www.unilex.info/case.cfm?pid=1&amp;do=c&lt;br/&gt;ase&amp;id=1346&amp;step=FullText">http://www.unilex.info/case.cfm?pid=1&amp;do=c ase&amp;id=1346&amp;step=FullText</a>	¶ 133
----------------------	---	-------

---

#### ARBITRATION COURT OF MOSCOW CITY

---

---

<i>Petroleum Case</i>	Petroleum Case 3 April 1995 Case No. 18-40 Available At: <a href="http://cisgw3.law.pace.edu/cases/950403r1.html">http://cisgw3.law.pace.edu/cases/950403r1.html</a>	¶ 102
-----------------------	--	-------

---

#### **BULGARIAN CHAMBER OF COMMERCE AND INDUSTRY**

---

<i>BCCI Case</i>	<i>BCCI Case</i> 12 March 2001 Case No. 33/98 Available At: <a href="http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010312bu.html">http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010312bu.html</a>	¶ 19
------------------	---	------

---

#### **CHINA INTERNATIONAL ECONOMIC & TRADE ARBITRATION COMMISSION**

---

<i>Cysteine Monohydrate Case</i>	<i>Cysteine Monohydrate Case</i> 6 June 1991 Case No.: 1991/03 Available At: <a href="http://cisgw3.law.pace.edu/cases/910606c1.html">http://cisgw3.law.pace.edu/cases/910606c1.html</a>	¶ 65
----------------------------------	--	------

---

---

<i>Vitamin C Case</i>	<i>Vitamin C Case</i> 18 August 1997 Available At: <a href="http://cisgw3.law.pace.edu/cases/970818c1.html">http://cisgw3.law.pace.edu/cases/970818c1.html</a>	¶ 66
-----------------------	---	------

---

<i>Oxytetracycline Case</i>	<i>Oxytetracycline Case</i> 15 November 1996 Available At: <a href="http://cisgw3.law.pace.edu/cases/961115c1.html">http://cisgw3.law.pace.edu/cases/961115c1.html</a>	¶ 66
-----------------------------	---	------

---

**COURT OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE**

---

<i>Fashion Products Case</i>	<i>Fashion Products Case</i> 2003 Case No. 11849 Available At: <a href="http://www.unilex.info/case.cfm?id=1160">http://www.unilex.info/case.cfm?id=1160</a>	¶ 86
------------------------------	--	------

---

**FOREIGN TRADE COURT OF ARBITRATION ATTACHED TO THE SERBIAN CHAMBER OF COMMERCE**

---

---

<i>Milk Packaging Equipment Case</i>	<i>Milk Packaging Equipment Case</i> 15 July 2008 Case No. 4/05 Available At: <a href="http://cisgw3.law.pace.edu/cases/080715sb.html">http://cisgw3.law.pace.edu/cases/080715sb.html</a>	¶ 102
--	---	-------

---

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

---

<i>Apotex v. United States of America</i>	<i>Apotex v. United States of America</i> <i>Procedural Order on Document Production</i> 5 July 2013 ICSID Case No. ARB(AF)/12/1 Available At: <a href="http://www.italaw.com/sites/default/files/case-documents/italaw1575.pdf">http://www.italaw.com/sites/default/files/case-documents/italaw1575.pdf</a>	¶ 33
---	---	------

---

<i>British Caribbean Bank v. Belize</i>	<i>British Caribbean Bank Ltd. v. The Government of Belize Decisions on the Government of Belize's Requests for Production of Documents</i> 19 December 2013 Available At: <a href="http://www.italaw.com/sites/default/files/case-documents/italaw4189.pdf">http://www.italaw.com/sites/default/files/case-documents/italaw4189.pdf</a>	¶ 38
---	---	------

---

---

*Caratube v. Kazakhstan*      *Caratube International Oil Company LLP v. Republic of Kazakhstan Procedural Order No. 2 Regarding Document Production* ¶ 33  
26 April 2010  
ICSID Case No. ARB/08/12  
Available At:  
<http://www.italaw.com/sites/default/files/case-documents/ita0130.pdf>

---

*Glamis Gold v. The United States of America*      *Glamis Gold Ltd. v. The United States of America Decision on Objections to Document Production* ¶ 36  
20 July 2005  
Available At:  
<http://www.italaw.com/sites/default/files/case-documents/ita0364.pdf>

---

*MINE v. Republic of Guinea*      *Maritime International Nominees Establishment v. Republic of Guinea* ¶ 87  
1988  
ICSID Case No. ARB 84 4  
Available At:  
[https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC674\\_En&caseId=C136](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC674_En&caseId=C136)

---

---

*Tidewater v. Venezuela*      *Tidewater Inc. v. The Bolivarian Republic of Venezuela Procedural Order No. 1 on Production of Documents* ¶ 36  
29 March 2011  
ICSID Case No. ARB/10/5  
Available At:  
<http://www.italaw.com/sites/default/files/case-documents/ita0861.pdf>

---

**PERMANENT COURT OF ARBITRATION**

---

*Philip Morris v. Australia*      *Philip Morris Asia Ltd. v. The Commonwealth of Australia Procedural Order No. 2* ¶ 33  
23 September 2014  
PCA Case No. 2012-12  
Available At:  
<http://www.italaw.com/sites/default/files/case-documents/italaw4067.pdf>

---

**SCHIEDSGERICHT DER HANDELSKAMMER [ARBITRAL TRIBUNAL] HAMBURG**

---

*Chinese Goods Case*      *Chinese Goods Case* ¶ 102  
21 June 1996  
Case No. Partial award of 21 March 1996  
CLOUT 166  
Available At:  
<http://cisgw3.law.pace.edu/cases/960321g1.html>

---

**TRIBUNAL OF INTERNATIONAL COMMERCIAL ARBITRATION AT THE RUSSIAN FEDERATION CHAMBER OF COMMERCE**

---

---

<i>RFCC Case</i>	<i>RFCC Case</i> 6 June 2000 Case No. 406/1998 CLOUT 476 Available At: <a href="http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000606r1.html">http://www.cisg.law.pace.edu/cisg/wais/db/cases2/000606r1.html</a>	¶ 19
------------------	---	------

---

<i>TICA Case</i>	<i>TICA Case</i> 16 February 2004 Case No. 107/2002 Available At <a href="http://cisgw3.law.pace.edu/cases/040216r1.html">http://cisgw3.law.pace.edu/cases/040216r1.html</a>	¶ 65
------------------	--	------

---

**ZÜRICH CHAMBER OF COMMERCE**

---

---

<i>Soinco v. NKAP</i>	<i>Soinco v. NKAP</i> 31 May 1996 Case No. ZHK 273/95 Available At: <a href="http://cisgw3.law.pace.edu/cases/960531s1.html">http://cisgw3.law.pace.edu/cases/960531s1.html</a>	¶ 86, 90
-----------------------	--	----------

---

## **Note on the Preparation of This Memorandum**

References to books or articles in the Arguments of this Memorandum for the Respondent will appear in alphabetical order and are comprised of the surname of the author, followed by the page number, section number or paragraph number. If an author has multiple publications, the surname of the author will be followed by the year of publication and the page number, section number or paragraph number. If the publication is written by multiple authors, the surname of each author will be separated by a stroke. In the Index of Authorities, the starting page numbers of journal articles have been included where possible. In the Indices of Cases and Arbitral Awards, references will appear in alphabetical order of country or institution. In this Memorandum, the first reference following a quote is always a reference to the book, article, judgement or award in which the quote is to be found. The full citations to references are listed in the

## **Index of Legal Authorities, Index of Cases, and the Index of Arbitral Awards.**

For ease of checking, references to Exhibits in the Problem are followed by the number of the Exhibit and the page where the Exhibit is found in the Problem. References to all other documents in the Problem contain the name of the document, paragraph number and the page where the document is found in the Problem.

This Memorandum has been formatted in accordance with Rules 44-52 Moot Rules. In particular, as required by Rule 45, paragraphs are numbered.

In accordance with Rule 42 Moot Rules, the Arguments of the Respondent are responsive to the Arguments made by the Claimant. Accordingly, Arguments contained in this Memorandum have been written in response to the Arguments contained in the Memorandum

for Claimant submitted by Palacký University. Any Argument raised in this Memorandum which is not responsive to Arguments raised in the Memorandum of Palacký University will contain the phrase [NEW ARGUMENT] in square brackets after its heading or sub-heading.

**Statement of Facts**

1. RESPONDENT, VINO VERITAS Ltd. ('VINO VERITAS') is a specialty Mediterranean vineyard [*ST. CL.*, 2, 4]. CLAIMANT, Kaihari Waina Ltd. ('KAIHARI') is a wine merchant based in Equatoriana [*ST. CL.*, 1, 3]. KAIHARI and VINO VERITAS entered into a Framework Agreement on 22 April 2009 for the annual sale of between 7,500 and 10,000 bottles of 'diamond quality' wine by VINO VERITAS to KAIHARI [*EX. C 1*, 9]. Article 19 of the Framework Agreement stipulated that the 'contract shall run for a minimum period of 5 years' [*EX. C 1*, 9]. Article 20 of the Framework Agreement ('Arbitration Agreement') provides for the resolution of disputes between the Parties by way of arbitration at VIAC in Vindobona [*EX. C 1*, 9].
2. On 3 November 2014, VINO VERITAS sent a facsimile to all its customers, including KAIHARI, intending to alert them to the lower crop levels resulting from adverse weather conditions [*ANS. ST. CL.*, 10, 26]. Through KAIHARI's own error, this was not received by KAIHARI until at least 25 November 2014 [*PROC. ORD. NO. 2*, 18, 55].
3. On 4 November 2014, Mr Friedensreich, CEO of KAIHARI, sent a letter to VINO VERITAS ordering 12,000 bottles of VINO VERITAS' diamond quality Mata Weltin 2014 wine ('Mata Weltin Wine') [*EX. C 2*, 10].
4. On 25 November 2014, Ms Buharit, KAIHARI's development manager, met with Mr Weinbauer, VINO VERITAS' CEO, to discuss their ongoing relationship [*EX. C 2*, 10]. In the meeting, Mr Weinbauer communicated to Ms Buharit his frustration at the size of KAIHARI's order, given the extenuating circumstances under which VINO VERITAS was operating [*EX. C 5*, 13]. At the end of the meeting, Mr Weinbauer merely stated he would give the order 'favourable consideration' [*ANS. ST. CL.*, 13, 26]. As Ms Buharit left VINO VERITAS, she saw a vehicle branded 'SUPERWINES', the name of an

- international wine wholesaler, arrive at VINO VERITAS' premises [EX. C 5, 13].
5. On 1 December 2014, Mr Weinbauer sent a letter to KAIHARI stating that VINO VERITAS would only be able to deliver 4,500-5,000 bottles of Mata Weltin Wine in the coming year. He explained that this decision was made to preserve VINO VERITAS' 'long lasting relationship[s] with all [its] customers' [EX. C 3, 11]. These relationships were not contractual at the time [PROC. ORD. NO. 2, 29, 57].
  6. On 2 December 2014, 'The Vineyard' reported that SUPERWINES 'paid a premium to convince VINO VERITAS to supply' it with Mata Weltin Wine [EX. C 4, 12]. Articles in other periodicals suggested that SUPERWINES used such pricing to become more 'appealing' than their competitors [EX. C 4, 12]. Out of fairness to its other customers, VINO VERITAS initially only allocated 4,500 bottles of Mata Weltin Wine to SUPERWINES, even though SUPERWINES requested 15,000 bottles [ANS. ST. CL., 15, 26]. Subsequently, VINO VERITAS allocated a further 1,000 bottles to SUPERWINES [PROC. ORD. NO. 2, 24, 56].
  7. On 2 December 2014, Mr Friedensreich rejected the offered quantity of Mata Weltin Wine proposed by VINO VERITAS and instead demanded that VINO VERITAS supply KAIHARI with 10,000 bottles of Mata Weltin Wine [EX. C 6, 14]. KAIHARI accepted the proposed increased price of EUR41.50 per bottle [EX. C 6, 14]. In a letter dated 4 December 2014, VINO VERITAS responded to KAIHARI's demand by terminating the Framework Agreement [EX. C 7, 15].
  8. On 5 December 2014, KAIHARI retained Amadir Xynisteri of LawFix on a contingency basis to act as its attorney to appear in Mediterranean courts on matters regarding its dispute with VINO VERITAS [EX. C 10, 18].
  9. On 8 December 2014, KAIHARI sought an interim injunction from the High Court of Mediterraneo to prevent 10,000 bottles of Mata Weltin Wine from being sold or committed for sale by VINO VERITAS [ST.

- CL.*, 10, 5]. This injunction was granted by the High Court of Mediterraneo on 12 December 2014 [*Ex. C 8, 16*].
10. Following KAIHARI's action in the High Court of Mediterraneo, VINO VERITAS sought a declaration that it had not breached the Framework Agreement from the High Court of Mediterraneo on 30 January 2015 [*Ex. C 9, 17*].
  11. On 23 April 2015, the High Court of Mediterraneo declared that the Arbitration Agreement precluded the High Court from dealing with this matter and referred the case to arbitration. It ordered that each party pay its own costs [*Ex. C 9, 17*].
  12. On 25 May 2015, LawFix sent KAIHARI an invoice for US\$50,280.00, comprised of \$45,000.00 for their contingency, \$4,400.00 for work undertaken, and \$880.00 tax [*Ex. C 11, 19*].

**Arguments**

13. The Respondent, VINO VERITAS, has prepared this Memorandum in accordance with the Arbitral Tribunal's Procedural Order No. 1, issued on 2 October 2015. This Memorandum will follow the order of issues adopted in KAIHARI's Memorandum. It is argued that:
  1. The Arbitral Tribunal neither has the power to, nor should order the production of the documents requested to calculate the profits made by VINO VERITAS in its sale of Mata Weltin Wine to SUPERWINES;
  2. KAIHARI is not entitled to damages for litigation costs of US\$50,280.00, which represent the sum of costs for KAIHARI's interim injunction and defence against the proceedings in the High Court of Mediterraneo; and,
  3. KAIHARI cannot claim as damages the profits made by VINO VERITAS in its sale of Mata Weltin Wine to SUPERWINES.

## Arguments Part I

### **The Arbitral Tribunal Does Not Have the Power to Order *Vino Veritas* to Produce the Documents Requested and Should Not Make Such an Order**

14. An arbitral tribunal's power to order discovery is governed by the procedural law of the arbitral seat [*TRITTMAN/KASOLOWSKY*, 311; *MOSES*, 64]. This Arbitration is taking place in Danubia, where the UNCITRAL Model Law on International Commercial Arbitration ('Model Law') has the force of law [*PROC. ORD. NO. 1*, 5(3), 51; *PROC. ORD. NO. 2*, 57, 61]. Under Article 19 Model Law, the Parties have autonomy to agree upon the arbitral procedure, including the existence and scope of any document production [*NOBLE CHINA; DESPUTEAUX V. ÉDITIONS CHOUETTE*].
15. KAIHARI contends that it is entitled to a disgorgement of VINO VERITAS' profits and that the only method by which it can calculate its damages is through the production of the documents requested [*CL. MEMO.*, 11, 5]. Arguments Part III of this Memorandum responds to this claim and argues that KAIHARI is not entitled to a disgorgement of VINO VERITAS' profits from its sale to SUPERWINES and therefore that the documents are not required. However, in the event that the Tribunal finds that a disgorgement of VINO VERITAS' profits is available to KAIHARI, it is still argued, in this Part, that an order for document production is not available.
16. The Arbitral Tribunal does not have the power to order VINO VERITAS to produce the documents requested because, **(A)** The production of the type of documents requested is inconsistent with the law of the arbitral seat and the Framework Agreement; **(B)** KAIHARI has not satisfied the requirements under Article 3(7) International Bar Association Rules on the Taking of Evidence in International Arbitration ('IBA Rules'). Furthermore, **(C)** Pursuant to the Model Law and the Vienna International Arbitration Centre Rules of

Arbitration ('VIAC Rules'), the Arbitral Tribunal should not order VINO VERITAS to produce the documents requested by KAIHARI.

**A. The production of the type of documents requested is inconsistent with the law of the arbitral seat and the Framework Agreement**

17. KAIHARI contends that, 'The Arbitration Clause does not exclude the document production requested' as the 'Common intention of the parties was to exclude discovery, not document production' [*CL. MEMO., 15-43, 6-11*]. Further, KAIHARI argued that document production is generally allowed under the VIAC Rules and the Model Law, and so the Arbitral Tribunal can and should order document production [*CL. MEMO., 7-10, 4-5*]. In response, it is argued that, **(1)** The Arbitration Agreement expressly prohibits document production of the kind requested by KAIHARI; and, **(2)** The relevant procedural law does not authorise the Arbitral Tribunal to order the production of the documents requested.

**1. The Arbitration Agreement expressly prohibits document production of the kind requested by Kaihari**

18. KAIHARI claims that the Arbitration Agreement does not exclude document production [*CL. MEMO., 19, 7*]. In its interpretation of the Arbitration Agreement, KAIHARI applies Article 4.1 UNIDROIT Principles of International Commercial Contracts ('UNIDROIT Principles') to determine the common intention of the Parties [*CL. MEMO., 20, 7*]. The UNIDROIT Principles are the domestic contract law of Danubia [*ANS. ST. CL., 38, 29*]. However, this application is erroneous because Procedural Order No. 1 states that the Arbitration Agreement is in principle governed by the United Nations Convention on Contracts for the International Sale of Goods ('CISG') and the Model Law [*PROC. ORD. NO. 1, 5(3), 51*].
19. The UNIDROIT Principles cannot apply because under Article 7(2) CISG, recourse to domestic law is only available when there is a clear gap in the CISG [*GABRIEL, 63; RFCC CASE; BCCI CASE*]. Article 8 CISG assists in the interpretation of the statements and conduct of

- parties to a contract [*SCHLECHTRIEM, 70; ROLLS OF RUBBER CASE; CEREAL CASE*]. As Article 8 is a provision applicable to the interpretation of contractual provisions [*CLOUT CASE NO. 877; KRÖLL/MISTELIS/PERALES, 143*], no gap exists and therefore the CISG should prevail.
20. Under Article 8(1) CISG, the contract is to be interpreted according to the intent of a party ‘where the other party knew or could not have been unaware’ of that intent. If Article 8(1) is inapplicable, statements ‘are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances’ [*ART. 8(2) CISG; BIANCA/BONELL, 99; MAGNESIUM CASE*]. The ‘other party’ refers to the recipient of the communication [*SCHLECHTRIEM, 70-72; BIANCA/BONELL, 98-99; DRIED APPLE RINGS CASE; PRINTED WORK CASE*].
21. Here, KAIHARI drafted the terms of the Arbitration Agreement and VINO VERITAS was the ‘recipient’ [*ANS. ST. CL., 21, 27; EX. C 12, 20*]. Thus, it is argued that, **(i)** VINO VERITAS neither knew nor could have been aware of KAIHARI’s intended meaning of ‘discovery’; and, **(ii)** Alternatively, a reasonable person in VINO VERITAS’ position would have understood the preclusion of discovery to extend to all kinds of document production.
- (i) VINO VERITAS neither knew nor could have been aware of KAIHARI’s intended meaning of ‘discovery’**
22. The Arbitration Agreement provides that ‘no discovery shall be allowed’ [*EX. C 1, 9*]. KAIHARI contends that the term ‘discovery’ was not ‘meant’ to exclude ‘document production’ [*ST. CL., 29, 8; CL. MEMO., 26, 8*]. However, KAIHARI has presented no evidence to indicate that it actually communicated its intended meaning of ‘discovery’ to VINO VERITAS. Consequently, it cannot prove that VINO VERITAS knew of its intent. Rather, it has sought to rely on the flawed assumption that the meaning of ‘discovery’ was so obvious that VINO VERITAS could not have been unaware of it [*CL. MEMO., 38, 10*].

23. KAIHARI's assertion that 'discovery is a US legal term', as opposed to 'document production', is inaccurate [*CL. MEMO.*, 23, 7]. Indeed, the term 'discovery' is used in legal systems around the world. It can encompass not only the broad, US-style discovery KAIHARI refers to, but also, in Australia, a much more narrow class of document production [*RULE 20.14(2), FEDERAL COURT RULES 2011; ALANCO AUSTRALIA V HIGGINS (NO. 2)*], similar to that under the IBA Rules. Consequently, 'discovery' can be interpreted as a general term referring to the production of all kinds of documents. A prohibition on 'discovery', as found in the Arbitration Agreement, should therefore extend to all forms of discovery, including the narrower document production sought by KAIHARI. This is the interpretation of 'discovery' that *VINO VERITAS* intended at the time of the formation of the Framework Agreement [*EX. R I, 31*].
- (ii) Alternatively, a reasonable person in *VINO VERITAS*' position would have understood the preclusion of discovery to extend to all kinds of document production**
24. KAIHARI claims that 'discovery' only refers to US-style discovery and, as 'document production' is a procedural device which only provides 'documents on requests', the Arbitration Agreement does not prohibit document production [*CL. MEMO.*, 23, 7]. KAIHARI also notes that the Arbitration Agreement states that, 'This contract is governed by the law of Danubia' [*EX. C I, 9*] and that Danubian law only provides for document production, not the broader class of discovery [*CL. MEMO.*, 20, 7; *ST. CL.*, 29, 8]. It also relied on a witness statement from its own in-house lawyer to establish that a reasonable person would have noticed a difference between 'discovery' and 'document production' [*CL. MEMO.*, 41, 11]. This approach errs for a number of reasons.
25. First, KAIHARI argues that the central distinction between 'discovery' and 'document production' is that the latter is procedural in nature [*CL. MEMO.*, 23, 7]. However, 'procedure', for the purposes of international arbitration, refers to the rules relied on by an arbitral tribunal to hear matters [*VARADY/BARCELO/VON MEHREN, 480*].

Definitionally, then, document production and discovery are both procedural mechanisms for one party to disclose documents to the other.

26. Second, US-style discovery is expansive; it encompasses more than simply document production [*REDFERN/HUNTER*, 299; *ACS CONSULTANT V. WILLIAMS*]. Conversely, in a civil law jurisdiction, the usual practice is for each party to produce only the documents upon which it relies to establish its case [*REDFERN/HUNTER*, 300; *WIRTH/ROUVINEZ/KNOLL*, 83]. ‘Discovery’ is used in Australia, a common law jurisdiction, to refer to a similar method of limited document production [*PRACTICE NOTE CM5*; *RULE 20.14(2), FEDERAL COURT RULES 2011*; *UWA V GRAY*]. Given ‘discovery’ has been applied to refer to both US-style discovery and IBA Rules-style document production, a reasonable person would independently come to this conclusion and consider it to be a *general* term, not a specific legal term. Consequently, a reasonable person would not consider ‘document production’ as a separate class, but as a subset of ‘discovery’. It is therefore prohibited by the Arbitration Agreement.
27. Third, KAIHARI argues that its in-house lawyer’s interpretation of the Arbitration Agreement reflected that of a reasonable person [*CL. MEMO.*, 41, 11]. This approach is fundamentally flawed because the purpose of Article 8(2) CISG is to ascertain the *objective* intention of the Parties [*HONNOLD*, 158; *MAGNESIUM CASE*; *CAFÉ INVENTORY CASE*; *CONVEYOR BAND CASE*]. That Wikipedia, a US-hosted website, favours a US definition no more points towards objective correctness than the opinion of a legal employee of KAIHARI [*EX. C 12*, 20]. Rather, ‘under Article 8(2) ambiguity in a statement is to be resolved against the party who formulated this statement’ [*HONNOLD*, 160; *KOULADIS*, 183; *AUTOMOBILES CASE*].
28. Thus, the test is not how a reasonable party in the position of KAIHARI would have interpreted the provision, but rather how a reasonable party in the position of VINO VERITAS would have interpreted it. A reasonable party in the position of VINO VERITAS, given the shared

nature of ‘discovery’ and ‘document production’, the fact that ‘discovery’ is a broad term that can encompass ‘document production’, and in the absence of any statement from KAIHARI to the contrary, would have interpreted ‘no discovery’ as encompassing a prohibition on document production.

**2. *The relevant procedural law does not authorise the Arbitral Tribunal to order the production of the documents requested***

29. KAIHARI contends that the Arbitral Tribunal is empowered to order the production of the documents requested by either the VIAC Rules or the Model Law [*CL. MEMO.*, 7, 4]. However, it is argued that, **(i)** The VIAC Rules and the Model Law are limited by the Agreement of the Parties to exclude ‘discovery’; and, **(ii)** Alternatively, an order accepting KAIHARI’s request for document production would be contrary to the efficiency of the proceedings.
- (i) The VIAC Rules and the Model Law are limited by the Agreement of the Parties to exclude ‘discovery’**
30. The Model Law ‘applies to international commercial arbitration’ [*ART. 1(1) MODEL LAW*], but does not deal specifically with the subject of disclosure. Under Article 19(1) Model Law, parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings [*NOBLE CHINA; DESPUTEAUX V. ÉDITIONS CHOUETTE*]. Accordingly, where parties have incorporated institutional arbitration rules, they must be followed [*ART. 19(1) MODEL LAW*].
31. KAIHARI and VINO VERITAS expressly incorporated the VIAC Rules in Article 20 of the Framework Agreement [*EX. C 1, 9*]. Similarly, Article 28 VIAC Rules provides that the Arbitral Tribunal ‘shall conduct the arbitration in accordance with ... the agreement of the parties’. Thus, under both the Model Law and the VIAC Rules the Arbitral Tribunal’s power to order document production is subject to the Agreement of the Parties.
32. AS VINO VERITAS and KAIHARI have explicitly agreed that ‘no discovery shall be allowed’ [*EX. C 1, 9*], the Arbitral Tribunal does not have the power to order the production of the documents

requested. Hence, neither the underlying procedural law, nor the VIAC Rules empowers the Arbitral Tribunal to order the production of the documents requested by KAIHARI.

**(ii) Alternatively, an order accepting KAIHARI's request for document production would be contrary to the efficiency of the proceedings [NEW ARGUMENT]**

33. The Arbitration Agreement stipulates that, 'The proceedings shall be conducted in a fast and cost efficient way' [EX. C 1, 9]. Consequently, as recognised by Mr Weinbauer, VINO VERITAS' former CEO, 'Any such request [for document production] would be seriously disruptive to our business' [EX. R 1, 31]. Further, businesses such as VINO VERITAS produce many documents, each of which would have to be inspected to determine its relevance and whether it contains confidential information [MARGHITOLA, 102; APOTEX V. UNITED STATES OF AMERICA]. Such a process would be 'time-consuming and, therefore, expensive' [MARGHITOLA, 102; CARATUBE V. KAZAKHSTAN; PHILIP MORRIS V. AUSTRALIA]. Indeed, 'document production often represents the most expensive aspect of an arbitration proceeding' [RIVKIN/ROWE, 127]. Thus, an order for document production would be contrary to the Agreement of the parties to conduct the proceedings efficiently.

**B. *Kaihari* has not satisfied the requirements under Article 3(7) International Bar Association Rules on the Taking of Evidence in International Arbitration ('IBA Rules')**

34. Alternatively, if the Arbitration Agreement does not preclude an order of document production, the Arbitral Tribunal still should not make such an order because KAIHARI has failed to satisfy the requirements of Article 3(7) IBA Rules. KAIHARI contends that the Arbitral Tribunal should apply the IBA Rules as this is in accordance with international arbitration practice [CL. MEMO., 46, 11-12]. As VINO VERITAS does not dispute the adoption of the IBA Rules, they can be applied under Article 1(1) [XINYI GROUP].

35. KAIHARI claims that the relevant criteria of the IBA Rules have been satisfied [*CL. MEMO.*, 52-64, 13-15]. However, Article 3(7) IBA Rules does not allow the Arbitral Tribunal to order document production where, (1) The objections outlined in Article 9(2) IBA Rules apply; and, (2) The requirements of Article 3(3) IBA Rules are not satisfied.
- 1. The objections outlined in Article 9(2) IBA Rules apply**
36. Article 9(2)(e) IBA Rules directs an arbitral tribunal to exclude evidence ‘on grounds of commercial or technical confidentiality’. When an objection to document production arises on the basis of Article 9(2), ‘a tribunal must weigh a party’s need for the documents against the other party’s interest in protecting the information’ [*BEHARRY*, 53; *SACHS/LÖRCHER*, 285; *TIDEWATER V. VENEZUELA*; *GLAMIS GOLD V. THE UNITED STATES OF AMERICA*].
37. Through its request for the production of documents, KAIHARI seeks ‘to obtain confidential business information’ [*ANS. ST. CL.*, 26, 28]. The documents requested fall within the period of ‘1 January 2014-14 July 2015’ and pertain to ‘the purchase of diamond Mata Weltin 2014’ [*ST. CL.*, 27, 7]. Although they are in relation to retrospective business transactions and negotiations, they still reveal VINO VERITAS’ price differentials and ‘long term strategies for positioning on a new market’ [*PROC. ORD. NO. 2, 61, 61*]. These documents are sufficiently commercially confidential to enliven exclusion. Accordingly, VINO VERITAS’ interest in protecting its information outweighs KAIHARI’s need for the production of the documents.
- 2. The requirements of Article 3(3) IBA Rules are not satisfied**
38. A request to produce must contain ‘a description of each requested Document sufficient to identify it’ [*ART. 3(3)(a)(i) IBA RULES*]. KAIHARI has not made any attempt to fulfill this requirement. Alternatively, and relevant here, the request must contain a ‘narrow and specific’ description of documents ‘that are reasonably believed’ to exist [*ART. 3(3)(a)(ii) IBA RULES*; *BRITISH CARIBBEAN BANK V. BELIZE*]. Under either requirement, the request must also state that the documents are in the ‘possession, custody or control’ of the other party [*ART. 3(3)(c)(ii) IBA RULES*].

39. For these reasons it is argued that, **(i)** KAIHARI's request is not sufficiently narrow and specific; **(ii)** KAIHARI's request did not prove it had a reasonable belief in the existence of the documents at the time of its request; and, **(iii)** KAIHARI has not proven that the documents it seeks are in the possession, custody or control of VINO VERITAS.
- (i) KAIHARI's request is not sufficiently narrow and specific**
40. KAIHARI has requested disclosure of *all* communications between VINO VERITAS and SUPERWINES pertaining to the purchase of Mata Weltin Wine from 1 January 2014 until 14 July 2015 [*ST. CL.*, 27, 7]. The IBA Working Party noted that a description would be specific enough if the party seeking production 'can identify with some particularity the nature of the documents sought and the general time frame in which they would have been prepared' [*THE IBA WORKING PARTY*, 9].
41. However, 'all communications' between VINO VERITAS and SUPERWINES regarding the sale of Mata Weltin Wine [*ST. CL.*, 27, 7], does not actually allude to the nature of the documents. '[A]ll communications' covers *any* communications between VINO VERITAS and SUPERWINES, which can include entirely different categories. This is broader than the documents necessary to measure VINO VERITAS' profits from its sale to SUPERWINES. Similarly, a timeframe of more than a year and a half is far too general to meet the requirements of Article 3(3)(a) IBA Rules.
- (ii) KAIHARI's request does not prove it had a reasonable belief in the existence of the documents at the time of its request**
42. KAIHARI's request also includes contractual documents relating to SUPERWINES' purchase of the Mata Weltin Wine [*ST. CL.*, 27, 7]. However, it has done nothing to show that these documents are 'reasonably believed to exist', as required by Article 3(3)(a)(ii) IBA Rules. The standard practice in the wine industry, as VINO VERITAS made KAIHARI aware, is to form verbal, not written contracts [*EX. R I*, 31]. VINO VERITAS only admitted that it sold a total of 5,500 bottles to SUPERWINES and that they engaged in 'discussions' and did not

sign a written contract [*ANS. ST. CL.*, 39, 30; *ANS. ST. CL.*, 15, 27; *PROC. ORD. NO.* 2, 23, 56]. There were thus no reasonable grounds included in its request upon which KAIHARI could base its belief.

**(iii) KAIHARI has not proven that the documents it seeks are in the possession, custody or control of VINO VERITAS**

43. Consistent with Article 3(3)(c)(i) IBA Rules, KAIHARI notes that the ‘documents are not in [its] possession’ [*ST. CL.*, 28, 8]. However, Article 3(3)(c)(ii) requires KAIHARI to prove that the documents requested are in the possession, custody or control of VINO VERITAS. It has not done this. Showing that it does not possess the documents is not enough for KAIHARI to prove that it believes that VINO VERITAS *does*, particularly given the involvement of SUPERWINES, a third party. Thus, the requirements of Article 3(3) are not satisfied and the Arbitral Tribunal does not have the power to order the production of the documents requested by KAIHARI under the IBA Rules.

**C. Pursuant to the Model Law and the Vienna International Arbitration Centre Rules of Arbitration (‘VIAC Rules’), the Arbitral Tribunal should not order *Vino Veritas* to produce the documents requested by *Kaihari***

44. Even if the Arbitral Tribunal has the power to order production of the relevant documents, it should not make such an order because it would be contrary to the general rules that govern this Arbitration. Article 18 Model Law and Article 28(1) VIAC Rules ensure that an arbitration is conducted with respect to the Parties’ right to be heard and their right to equal treatment. Accordingly, it is argued that, **(1)** The production of these documents is not required to ensure KAIHARI’s right to equal treatment; and, **(2)** The production of these documents is not required to ensure KAIHARI’s right to be heard.

**1. The production of these documents is not required to ensure *Kaihari*’s right to equal treatment**

45. KAIHARI claims that the exclusion of document production would violate its right to equal treatment and that Article 18 Model Law effectively invalidates the Parties’ agreement to exclude document

production [CL. MEMO., 11, 5]. Although Article 18 operates as a ‘mandatory rule’ of arbitration [CL. MEMO., 11, 5; HOLTZMANN/NEUHAUS, 550], as with other mandatory rules, it will only exclude the parties’ contractual agreement in specific circumstances [BORN, 2180-2181; MARGHITOLA, 23; MITSUBISHI MOTORS]. Importantly, Article 18 is aimed at preventing the Arbitral Tribunal from engaging in ‘egregious and injudicious conduct ... not ... to protect a party from its own failures or strategic choices’ [UNCITRAL MODEL LAW DIGEST, 98; XINYI GROUP, 20; BORN, 2181; BREKOULAKIS/RIBEIRO, 879; RE CORPORACIÓN TRANSNACIONAL; XEROX]. Consequently, it is argued that, (i) Refusing KAIHARI’s request would not be contrary to its right to equal treatment; and, (ii) Granting KAIHARI’s request would deny VINO VERITAS’ right to equal treatment.

**(i) Refusing KAIHARI’s request would not be contrary to its right to equal treatment**

46. KAIHARI argues that to deny the request would provide VINO VERITAS with an unfair advantage because KAIHARI’s ‘only opportunity to ... precisely calculate the damages is contained in the documents requested.’ [CL. MEMO., 11, 5]. However, the right to equal treatment is not concerned with a sole party’s right to fully present its case, but rather with ensuring each party is afforded the same procedural treatment [BORN, 2173; AYGÜL/GÜLTUTAN, 88]. Denying KAIHARI’s request would not contravene the equal treatment of the Parties as document production would not be available to either party.

**(ii) Granting KAIHARI’s request would deny VINO VERITAS’ right to equal treatment**

47. KAIHARI argues that VINO VERITAS’ right to equal treatment would not be infringed by an order for the production of the documents it requests [CL. MEMO., 66, 15-16]. It has been recognised that the application of the IBA Rules can affect the equal treatment of the parties where different privileges exist, particularly where one party

is domiciled in a common law country and the other a civil law country [*DRAETTA*, 337; *SACHS/LÖRCHER*, 286].

48. Accordingly, Article 9(2)(b) and 9(3) IBA Rules allow the exclusion of evidence in document production on the basis of the applicable privileges afforded to the Parties [*SACHS/LÖRCHER*, 285; *THE IBA WORKING PARTY*, 25]. Where such privileges exist, under Article 9(2)(g), the Tribunal must take into account whether the production of requested documents would create unfairness [*THE IBA WORKING PARTY*, 26].
49. Here, KAIHARI is based in Equatoria, which is a common law country [*PROC. ORD. NO. 2*, 68, 62]. Conversely, VINO VERITAS is based in Mediterraneo, a civil law country [*PROC. ORD. NO. 2*, 68, 62]. Equatorian domestic law has developed a number of ‘exceptions and privileges’ which would protect KAIHARI from obligations to produce its ‘contracts and pre-contractual communications with its final customers’ in this Arbitration [*ANS. ST. CL.*, 30, 28].
50. Therefore, the same type of production that KAIHARI requests is not available to VINO VERITAS. If the Arbitral Tribunal ordered the production of the documents requested, KAIHARI would be afforded a procedural advantage because a comparable opportunity would not be open to VINO VERITAS. Consequently, an order of document production would be contrary to VINO VERITAS’ right to equal treatment.

**2. *The production of these documents is not necessary to ensure Kaihari’s right to be heard***

51. KAIHARI also argues that the production of these documents is necessary to protect its right to be heard [*CL. MEMO.*, 66, 15-16]. Although the principle of the right to be heard extends to questions of evidence [*UNCITRAL MODEL LAW DIGEST*, 98; *PACKAGING MACHINE CASE*], it does not necessarily require the production of documents [*BORN*, 2180]. The right to be heard can only be argued for the opportunity to ‘present arguments’ on ‘all of the necessary building blocks’ of the tribunal’s conclusions [*OAO NORTHERN SHIPPING; HOCHTIEF AIRPORT*]. For these reasons it is argued that (i) KAIHARI

bears the burden to prove its own losses; and, **(ii)** KAIHARI has failed to discharge its burden and cannot rely on an alleged violation of its rights.

**(i) KAIHARI bears the burden to prove its own losses [NEW ARGUMENT]**

52. If the Arbitral Tribunal finds that damages are recoverable in the form of a disgorgement, it should still not order the production of the documents requested as KAIHARI has not provided sufficient proof of its own losses. Under the CISG, an aggrieved party must prove that it has suffered a loss and the extent of that loss [*SCHWENZER/SCHLECHTRIEM, 771*]. A ‘party cannot simply assert ... a proposition and then rest his case ... throwing the burden of proof on the other party’ [*BISHOP/CRAWFORD, 12.07 C 1*]. Therefore, KAIHARI ought to produce its own documents in order to quantify or attempt to quantify any alleged losses it has suffered.

**(ii) KAIHARI has failed to discharge its burden and cannot rely on an alleged violation of its rights [NEW ARGUMENT]**

53. Some scholarly opinion suggests that a request to produce documents is not contrary to the burden of proof on a party because that party must still prove the documents are ‘useful’ [*SCHLAEPFER, 132*]. Here, KAIHARI cannot claim that the request for VINO VERITAS’ documents is ‘useful’ without providing evidence of its own losses. KAIHARI has made no attempt to present any of its documents in relation to its cover transaction with Vignobilia Ltd., or any evidence of the profits it made in its sales to its customers through the sale of the replacement wine.
54. Moreover, a ‘party which has not attempted to make use of the rights that allegedly have been violated would not be in a position to invoke Article 18’ Model Law [*UNCITRAL MODEL LAW DIGEST, 98*]. Therefore, because KAIHARI has made no attempt to present its case and merely seeks to shift the burden to VINO VERITAS the Arbitral Tribunal should not order the production of the documents requested by KAIHARI.

**Document production should not be ordered as it was clearly excluded by the Agreement of the Parties. Even if that were not the case, KAIHARI has not met the requirements of the IBA Rules, so its request should not be granted. Finally, such an order would have no basis in KAIHARI's right to equal treatment or to be heard. Rather, any order would unfairly impact VINO VERITAS.**

## **Arguments Part II**

### **Kaihari is not Entitled to the Damages Claimed for its Litigation Costs of US\$50,280.00**

55. KAIHARI alleges that it is entitled to damages for the litigation costs incurred in its application for an interim injunction and in its defence of the declaratory proceedings. In response, it is argued that, **(A)** Litigation costs, as a matter of law, are not recoverable as damages under the CISG; **(B)** KAIHARI is not entitled to recover damages for its application for an interim injunction; and, **(C)** KAIHARI is not entitled to damages for the costs incurred in the defence of the declaratory proceedings.

#### **A. Litigation costs, as a matter of law, are not recoverable as damages under the CISG**

56. VINO VERITAS contends that KAIHARI is barred from claiming litigation costs as such costs are not a recoverable head of damage under the CISG. This is because, **(1)** The availability of litigation costs is governed by the relevant domestic procedural law; **(2)** The right to full compensation is not consistent with an award of litigation costs; and, **(3)** Pre-litigation costs are not available under the CISG.
- 1. The availability of litigation costs is governed by the relevant domestic procedural law**
57. KAIHARI claims that the CISG is the law governing the availability of damages for litigation costs [*CL. MEMO.*, 16, 78]. However, the

recoverability of litigation costs is generally governed by domestic procedural law [*FELEMEGAS*, 91-147; *LOOKOFSKY*, 98]. This was affirmed by Posner J in *Zapata*, the leading decision regarding the recoverability of litigation costs [*ZAPATA*, 4]. Exceptions to this are limited to where the contract ‘provides for their payment or when authorised by applicable rules’ [*CISG ADVISORY COUNCIL*, 5.4].

58. The Framework Agreement stipulated neither a procedure, nor liability for the payment of any potential litigation costs incurred by KAIHARI and VINO VERITAS. Consequently, the domestic procedural law governs the payment of these litigation costs. Under Mediterranean procedural law each party bears its own litigation costs [*PROC. ORD. NO. 2*, 59, 44; *ST. CL.*, 5, 13]. This is supported by the decision of the High Court of Mediterraneo, which ordered each party to pay its own litigation costs in the interim injunction and declaratory proceedings [*EX. C 8*, 16; *EX. C 9*, 17]. Thus, this order should stand.

**2. The right to full compensation is not consistent with an award of litigation costs**

59. KAIHARI further argues that the principle of full compensation should allow for the recovery of litigation costs [*CL. MEMO.*, 81, 20]. It is true that the principle of full compensation is designed to protect the right of a party to be compensated for damages arising from a breach of contract [*SCHLECHTRIEM*, 553; *KRÖLL/MISTELIS/PERALES*, 991]. However, the recovery of litigation costs under the CISG ‘would be contrary to the principle of equality between buyers and sellers’ [*CISG ADVISORY COUNCIL*, 5.4; *SAIDOV/CUNNINGTON*, 18]. Interpreting Article 74 CISG to create unequal remedies for buyers and sellers would be against the design and spirit of the CISG [*CISG ADVISORY COUNCIL*, 5.4; *BIANCA/BONELL*, 73].
60. Specifically, a breach of contract is required to claim damages under Article 74 CISG and thus a successful *respondent* cannot recover litigation expenses if the claimant has not committed a breach [*CISG ADVISORY COUNCIL*, 5.4]. If VINO VERITAS succeeds on the arguments before the Arbitral Tribunal, it would not be entitled to recover the

litigation costs it incurred in defending the interim injunction or bringing declaratory proceedings. Accordingly, litigation costs should not be available to KAIHARI in order to preserve the fundamental equality of the Parties under the CISG.

**3. *Pre-litigation costs are not available under the CISG***

61. KAIHARI argues that the CISG definitively allows for the recovery of legal costs that are incurred prior to litigation, or pre-litigation costs [CL. MEMO., 82, 20]. In making this claim, KAIHARI relies on Article 7(1) CISG [CL. MEMO., 81-83, 20], which requires the CISG, including Article 74, to be interpreted in a manner that is consistent with international opinion and judicial practice [ZELLER, 2004, 52; HONNOLD, 92-93].
62. However, KAIHARI fails to present sufficient international authority to allow for the recovery of pre-litigation costs. The *Zapata* decision referred to by KAIHARI, merely stated inconclusively that ‘certain pre-litigation legal expenditures ... would probably be covered as ‘incidental’ damages’ [ZAPATA, 3; FELEMEGAS 91-147]. The availability of ‘incidental damages’ under the CISG is the subject of substantial debate [KEILY, 5.3; SCHNEIDER, 2.2.I]. Even if incidental costs were recoverable, no consensus has been reached on the recoverability of litigation costs and pre-litigation costs within the realm of international practice and opinion [KEILY, 6.1 (b); FLECHTNER, 147].
63. Moreover, ‘pre-litigation costs that are incurred in preparation for or instead of litigation have to fall outside of the scope of Article 74 [CISG]’ in order to avoid the same unequal remedies between the buyer and seller that arise in the course of claiming litigation costs [SAIDOV/CUNNINGTON, 105]. Therefore, KAIHARI’s justification of the recoverability of pre-litigation costs on the basis of Article 7(1) is erroneous.

**B. Kaihari is not entitled to recover damages for its application for an interim injunction**

64. Even if litigation costs are generally recoverable as damages under the CISG, KAIHARI has failed to show that its costs are recoverable. More specifically, it is argued that, (1) An interim injunction is not a measure of mitigation under the CISG; (2) KAIHARI's application for an interim injunction was not necessary to mitigate its loss; and, (3) The losses KAIHARI incurred in its application for interim relief were not foreseeable.
- 1. An interim injunction is not a measure of mitigation under the CISG***
65. Pursuant to Article 77 CISG, there is a general obligation to take reasonable steps to mitigate loss [*FLAGSTONE TILES CASE; PROPANE CASE; CYSTEINE MONOHYDRATE CASE; TICA CASE*]. KAIHARI argues that an application for an interim injunction was necessary to mitigate against its loss [*CL. MEMO., 84, 20*].
66. However, Article 77 CISG does not extend to an interim injunction as a means of mitigation. Rather, available measures are 'those aimed at [lessening] the loss' such as remedying defects of goods [*BIANCA/BONELL, 560; SUNFLOWER SEED CASE; VITAMIN C CASE; OXYTETRECYCLINE CASE*]. An application for an interim injunction does not mitigate against the loss resulting from the breach, but rather attempts to remedy the breach by preserving the availability of specific performance. Distinct from a mitigatory attempt to lessen loss, KAIHARI sought an interim injunction to allow the enforcement of the Framework Agreement in order to prevent the loss from ever arising [*ST. CL., 10, 5*].
67. In this case, the High Court of Mediterraneo ordered that VINO VERITAS be 'restrained from selling or committing for sale any number of bottles' that would prevent the supply of 10,000 bottles of Mata Weltin Wine to KAIHARI [*EX. C 8, 16*]. If VINO VERITAS complied with this order and subsequently accepted KAIHARI's

request, there would be no breach of the Framework Agreement [*EX. C 1, 9*]. Thus, the interim injunction preserves the possibility of full performance and is not aimed at lessening the loss after the event. Classifying an interim injunction as a means of mitigation would distort the application of Article 77 CISG.

**2. *Kaihari's application for an interim injunction was not necessary to mitigate its loss***

68. KAIHARI contends that the application for an interim injunction was necessary to mitigate against any losses associated with non-performance [*CL. MEMO., 84, 20*]. However, even if an interim injunction was considered a form of mitigation under Article 77 CISG, it was not required by KAIHARI in these circumstances.
69. Here, the interim injunction was granted by the High Court of Mediterraneo on 8 December 2014 [*EX. C 8, 10*]. However, the Mata Weltin Wine was not to be bottled until May or June 2015, with distribution to customers to follow [*EX. R 2, 33*]. Under the majority view of Mediterranean law, as the delivery of bottles of wine to customers was not imminent, the 'risk would not have met the threshold for granting interim relief' [*PROC. ORD. NO., 2, 48, 59*].
70. KAIHARI's orders were normally negotiated before the orders of other customers [*ST. CL. 3, 4*]. The contracts with other customers were concluded between January and March, with a remaining 3,250 bottles of Mata Weltin Wine still available after March [*PROC. ORD. NO. 2, 45, 59*]. The application for an interim injunction was brought on 8 December 2014, long before the bottles would be committed for sale. As such, KAIHARI's claim for an interim injunction was not necessary. The delivery of the bottles was not imminent and there was no risk of VINO VERITAS committing for sale the number of bottles requested in the immediate future. Consequently, it cannot be said that KAIHARI's application for interim relief was necessary to mitigate its loss.

**3. The losses Kaihari incurred in its application for interim relief were not foreseeable**

71. It was not foreseeable that KAIHARI would pursue an interim injunction immediately after the termination of the agreement. The Parties agreed that all disputes ‘shall be settled amicably and in good faith’ [EX. C I, 9]. KAIHARI took no reasonable steps to resolve the issues between the Parties. Instead, it opted to prematurely initiate expensive court proceedings. This was not foreseeable to VINO VERITAS at the time of the conclusion of the contract.

**C. Kaihari cannot recover the litigation costs it incurred in its defence of the declaratory proceedings**

72. KAIHARI contends that VINO VERITAS breached the Arbitration Agreement by commencing declaratory proceedings in the High Court of Mediterraneo. Subsequently, KAIHARI asserts that the litigation costs incurred through its defence of these proceedings are recoverable under the UNIDROIT Principles [CL. MEMO., 103, 24].
73. In response it is argued that, **(1)** The Arbitration Agreement is exclusively governed by the Model Law and the CISG, not the UNIDROIT Principles; **(2)** The Arbitration Agreement is not governed by Article 74 CISG and so damages are not available for its breach. Irrespective of the Arbitral Tribunal’s findings on these matters; and, **(3)** The losses KAIHARI incurred were a consequence of its own conduct.

**1. The Arbitration Agreement is exclusively governed by the Model Law and the CISG, not the UNIDROIT Principles**

74. KAIHARI argues that damages for litigation costs are available for the breach of an Arbitration Agreement because such a breach is a substantive issue and is therefore governed by the UNIDROIT Principles. [CL. MEMO., 104–111, 24–26]. However, in Procedural Order No. 1, the Arbitral Tribunal recognised that the Parties had agreed that if no special procedural rules applied, the Framework Agreement, including the Arbitration Agreement, was to be governed

by the CISG [*PROC. ORD. NO. 1, 3, 51*]. It also acknowledged that Danubia had adopted the Model Law [*PROC. ORD. NO. 1, 3, 51*].

75. Further, in Procedural Order No. 2, it is again stated that where the Model Law does not address any issue in relation to the Arbitration Agreement, that issue is to be resolved under the CISG [*PROC. ORD. NO. 2, 63, 61*]. Therefore, the Arbitration Agreement is unambiguously governed by both the Model law and the CISG, not the UNIDROIT Principles.

**2. *The Arbitration Agreement is not governed by Article 74 CISG and so damages are not available for its breach***

76. KAIHARI claims that the Arbitration Agreement was sufficiently certain and that the Parties had expressed an intention to arbitrate all disputes arising out of the Framework Agreement [*CL. MEMO., 112-115, 26-27*]. Subsequently, KAIHARI advances a claim for damages for VINO VERITAS' breach of the Arbitration Agreement under Article 74 CISG.

77. In response, it is argued that Article 74 CISG does not apply to arbitration agreements. Specifically, **(i)** The CISG was not intended to override domestic procedural law governing the allocation of legal fees for the breach of an arbitration agreement; and, **(ii)** Overturning the decision pertaining to costs of the High Court of Mediterraneo would be contrary to the principle of *res judicata*.

**(i) *The CISG was not intended to override domestic procedural law governing the allocation of legal fees for the breach of an arbitration agreement* [NEW ARGUMENT]**

78. Although the Parties have agreed that the Arbitration Agreement is governed in part by the CISG [*PROC. ORD. NO. 1, 5(3), 51*], its application is limited. The provisions of the CISG are only applicable in so far as they aid in the interpretation and formation of the agreement [*KOCH, 267 - 286; SABATÉ USA; TISSUE MACHINE CASE; GENERATORS CASE; FILANTO, S.P.A. v. CHILEWICH*]. The CISG is not intended to extend to questions of procedure, particularly the recovery of litigation costs [*ZAPATA, 3-4; KOCH, 277*].

79. In this case, the High Court of Mediterraneo ordered that each party bear its own costs in relation to the declaratory proceedings [EX. C 9, 17]. Such a ruling is consistent with the established procedural law of Mediterraneo. Indeed, under the Mediterranean Code of Procedure, each party will always bear its own costs unless it is found that an ‘action is frivolous or has been brought in bad faith’ [PROC. ORD. NO. 2, 44, 59].
80. KAIHARI seeks to circumvent and subvert the Mediterranean Code of Procedure by claiming for damages in the form of litigation costs under Article 74 CISG. However, the CISG was never intended to override the autonomy of domestic legislatures to create their own laws governing civil procedure [ORLANDI, 30]. Foremost, the CISG is intended to apply to contracts for the sale of goods between parties domiciled in different contracting states and the substantive issues that arise from those contracts [ART. 1, CISG].
81. The notion that the substantive damages provisions of the CISG could override State laws governing procedural issues such as the allocation of litigation costs, is ill-founded [ZAPATA, 3-4; KOCH, 277]. Yet, it is upon this notion that KAIHARI rests its claims [CL. MEMO., 78-80, 19]. From a policy perspective, the integrity and application of domestic procedural laws ought to be upheld, lest they become redundant as increasing numbers of parties revert to the CISG to recover litigation costs.
- (ii) Overturning the decision pertaining to costs of the High Court of Mediterraneo would be contrary to the principle of *res judicata* [NEW ARGUMENT]**
82. Costs incurred in breaching an arbitration agreement are not recoverable where the defendant has already made a claim for costs at first instance or in an alternative forum [TAKAHASHI, 75]. In this case, *res judicata*, the principle that a judgement is final and binding [LY/SHEPPARD, 2; WONG, 53], applies. Recognition of this judgement occurs where the defendant has submitted to the jurisdiction of the first forum by requesting an order for costs [TAKAHASHI, 75].

83. In this case, KAIHARI requested that the High Court of Mediterraneo award litigation costs [*PROC. ORD. NO. 2, 44, 59*]. KAIHARI thus submitted to the jurisdiction of the High Court of Mediterraneo on this issue. It was found that each party should bear its own costs [*PROC. ORD. NO. 2, 44, 59*]. As such, the judgement is binding and a claim for costs cannot be brought before the Arbitral Tribunal.
84. In conclusion, Article 74 CISG neither does, nor should apply to arbitration agreements. Article 74 generally does not provide for the recovery of procedural costs, especially in relation to arbitration agreements. Additionally, here, the principle of *res judicata* applies to the High Court of Mediterraneo's costs order.

**3. *The losses Kaihari incurred were a consequence of its own conduct***

85. Even if litigation costs were available under Article 74 CISG, KAIHARI'S contention that there was a causal link between the litigation costs it incurred in its defence of the proceedings and the actions of VINO VERITAS is incorrect [*CL. MEMO., 117, 27*]. Specifically, VINO VERITAS' commencement of court proceedings was a result of KAIHARI'S own conduct. In establishing this, it is argued that (i) VINO VERITAS is exempt from liability under Article 80 CISG; and (ii) KAIHARI did not fulfill its obligation to mitigate its damages pursuant to Article 77 CISG.

**(i) *VINO VERITAS is exempt from liability under Article 80 CISG***  
**[NEW ARGUMENT]**

86. Article 80 CISG states that a 'party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission'. The words of the Article, specifically the use of the words 'act' or 'omission', should be interpreted broadly [*TALLON, 597*], and can include a 'late response to a request for information necessary for performance' [*FASHION PRODUCTS CASE*]. There is no agreed threshold for the test of causation. However, it is not necessary that the actions of the aggrieved party render performance impossible [*NEUMANN, 16; PROPANE CASE; SOINCO V. NKAP*].

87. The Arbitration Agreement states that, ‘all disputes shall be settled amicably and in good faith between the parties’ [EX. C 1, 9]. It is only where this settlement fails, that the Parties must submit the dispute to arbitration. The importance of good faith obligations is inherent in the CISG, particularly where a party fails to act and ‘remaining silent would put the other party at an unfair disadvantage’ [KLEIN, 129; MINE V. REPUBLIC OF GUINEA]. Therefore, KAIHARI had an obligation to act amicably and in good faith towards VINO VERITAS in attempting to settle all disputes, even before the commencement of formal legal proceedings. Prior to VINO VERITAS’ commencement of declaratory court proceedings, KAIHARI breached this obligation on two occasions.
88. First, VINO VERITAS ‘needed certainty as to the legal situation and as to the number of bottles available for the contracts with other customers’ [ANS. ST. CL., 20, 27]. It subsequently approached KAIHARI in an attempt to resolve the dispute in the first week of January 2015 [ANS. ST. CL., 20, 27]. However, KAIHARI, in breach of its obligation to act in good faith, was unwilling to negotiate and instead ‘unequivocally demanded the delivery of 10.000 bottles of diamond Mata Weltin 2014’ [ANS. ST. CL., 20, 27].
89. Second, VINO VERITAS was genuinely uncertain as to the meaning of the Arbitration Agreement, specifically the ‘forum in which an action had to be brought’ [ANS. ST. CL., 21, 27]. Indeed, the clause itself was provided by KAIHARI with little explanation or consultation with VINO VERITAS as to its intended meaning [ANS. ST. CL., 21, 27; EX. C 12, 20]. Subsequently, in its letter of 14 January 2015, VINO VERITAS communicated to KAIHARI that to its understanding, the Arbitration Agreement was unclear and that it intended, similar to KAIHARI’s action for interim relief, to commence declaratory proceedings in the High Court of Mediterraneo [EX. R 2, 33]. The principle of good faith requires that parties co-operate and exchange relevant information with each other [BROADCASTERS CASE]. Here, KAIHARI did not co-operate and did not clarify the meaning of the Arbitration Agreement

as requested by VINO VERITAS, breaching its obligation to act in good faith under the Agreement.

90. Notwithstanding the fact that each of these breaches are actionable in their own right, they also caused VINO VERITAS' alleged breach of the Arbitration Agreement for the purposes of Article 80 CISG. This Article exempts a breaching party from paying damages where the aggrieved party caused the breach through an act or omission [*SCHLECHTRIEM, 105; ZIEGEL, IV*]. It states that a 'party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission' [*ART. 80, CISG*]. Legal authority suggests that Article 80 is successfully invoked most often where the act or omission constitutes a breach of an agreement, as is the case here [*LEATHER GOODS CASE; AUTOMOBILES CASE; PROPANE CASE; SOINCO V. NKAP*].
91. With respect to the first breach, had KAIHARI been willing to negotiate, VINO VERITAS would have been more aware of its current legal and contractual position. Thus, it may not have deemed it necessary to launch declaratory court proceedings. More relevantly, regarding the second breach, had KAIHARI clarified that it intended the Arbitration Agreement to provide exclusively for VIAC arbitration, VINO VERITAS 'would have never started court proceedings but would have immediately gone to VIAC arbitration' [*ANS. ST. CL., 22, 27*]. That VINO VERITAS would have honoured KAIHARI's intention to avoid declaratory court proceedings is supported by the fact that VINO VERITAS even inquired as to the appropriate forum in which an action could be brought in the first place [*ANS. ST. CL., 21, 27*].
92. To conclude, in accordance with Article 80 CISG, KAIHARI may not claim damages for VINO VERITAS' alleged breach of the Arbitration Agreement as this breach was caused by KAIHARI's breaches of its own obligation to act in good faith.

**(ii) KAIHARI did not fulfill its obligation to mitigate its damages pursuant to Article 77 CISG**

93. Article 77 CISG requires that an aggrieved party reasonably mitigate its loss. Reasonableness is determined on a case-by-case basis. However, authority suggests that ‘a potential measure to mitigate damages is reasonable, if in good faith it could be expected under the circumstances’ [*OPIE, III; PROPANE CASE*]. Where a party fails to mitigate reasonably, the damages that it may recover are reduced, potentially to zero [*VINE WAX CASE*].
94. Here, KAIHARI agreed to US\$15,000.00 in contingency fees, which would become payable in the event of the successful defence of the declaratory proceedings [*EX. C 10, 18; EX. C 11, 19*]. KAIHARI contends that these fees were reasonably incurred as contingency fees were common in Mediterraneo and KAIHARI’s financial circumstances were such that it could only engage a lawyer on a contingency basis [*CL. MEMO., 100, 23*].
95. To the contrary, VINO VERITAS contends that these contingency fees were excessive and outside the scope of reasonable mitigation. KAIHARI engaged ‘one of the top firms in Mediterraneo’ [*PROC. ORD. NO. 2, 39, 58*] for a declaratory proceeding. These proceedings are merely declarations of the Parties’ legal rights and obligations. They do not mandate performance. Indeed, VINO VERITAS was not seeking to be adversarial in seeking such a declaration, it simply wished to clarify its current legal situation [*ANS. ST. CL., 21, 27*].
96. It was unreasonable for KAIHARI to incur US\$15,000.00 in legal contingency fees for an inquisitorial proceeding. In contrast, when KAIHARI sought an interim injunction, which is a measure that directly imposes a restriction on the rights of the injuncted party, in the same court, VINO VERITAS did not launch a defence as it ‘did not wish to escalate the dispute any further’, even though it disagreed with the granting of the injunction [*ANS. ST. CL., 19, 27*].

**D. The contingency fees *Kaihari* incurred were not reasonably foreseeable**

97. Article 74 CISG requires that the loss does ‘not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract’. That LawFix would incur *some* costs in preparing for both proceedings was reasonably foreseeable. However, it also charged US\$45,000.00 in contingency fees [*EX. C 10, 18; PROC. ORD. NO. 2, 41, 58*]. Contingency fees are not reflective of the ‘legitimate expenses in running a winning case but is instead compensating [a party] for a promise similar to an insurance policy it took out privately with its counsel’ [*VON GOELER, 395*]. That KAIHARI would be charged contingency fees that were approximately 8.5 times the actual cost of preparing for both proceedings was not reasonably foreseeable to VINO VERITAS and these fees should not be recoverable.
98. KAIHARI contends that it only entered into the more expensive contingent fee agreement because it did not have sufficient liquid capital to engage Mediterranean lawyers on a standard fee basis [*ST. CL., 13, 5*]. However, VINO VERITAS could not have been aware of KAIHARI’s financial circumstances. A party in breach cannot be expected to have foreseen the personal circumstances of the other party, particularly if it was ‘financially stable at the time of entering into the arbitration agreement’ [*VON GOELER, 395*]. Indeed, KAIHARI had entered into a long term Framework Agreement for the purchase of large quantities of Mata Weltin Wine. It was only at the time of the dispute that KAIHARI’s liquid financial resources were bound as a result of ‘acquiring a small printing house... for EUR 12 million’ [*PROC. ORD. NO. 2, 38, 58*]. Consequently, at the time of the conclusion of the Framework Agreement, VINO VERITAS could not have been aware of KAIHARI’s lack of liquidity. Thus, it could not have foreseen the excessive costs that KAIHARI incurred under its contingency fee agreement.

**As a matter of law, litigation costs are not available under Article 74 CISG. Even if they were available Kaihari cannot recover the litigation costs for its application for an interim injunction as it was not a reasonable measure of mitigation, nor was it foreseeable. Kaihari is also unable to recover the litigation costs it incurred in its defence of the declaratory proceedings as Article 74 does not apply to arbitration agreements. Alternatively, VINO Veritas is exempt from paying damages to Kaihari for litigation costs under Article 80.**

### **Arguments Part III**

#### **Kaihari Cannot Claim the Profits Made By VINO Veritas, Including Further Profits, From its Sale to SuperWines As Part of its Damages**

99. KAIHARI argues both that it is entitled to damages arising from VINO VERITAS' alleged breach, and that those damages can only be claimed in the form and quantity of the profits VINO VERITAS made from its sale of Mata Weltin Wine to SUPERWINES [*CL. MEMO., 119-148, 28-34*]. However, these arguments err in both law and fact as **(A)** KAIHARI's claimed losses do not meet the requirements of Article 74 CISG for damages to be awarded; and, even if KAIHARI's damages satisfied the requirements of Article 74, **(B)** The Arbitral Tribunal should not award a disgorgement of the profits made by VINO VERITAS.

#### **A. Kaihari's claimed losses do not meet the Article 74 CISG requirements for damages to be awarded**

100. KAIHARI has advanced claims under Articles 75, 76 and 79 CISG [*CL. MEMO., 139, 32; CL. MEMO., 132-148, 33-34*]. However, in accordance with Procedural Order No. 1 and Procedural Order No. 2, the issues are limited to whether KAIHARI's losses arising from the alleged breach of the Framework Agreement are recoverable under

Article 74 [*PROC. ORD. NO. 2, 67, 62; PROC. ORD. NO. 1, 5, 51*]. VINO VERITAS contends that the requirements of Article 74 are not met and thus KAIHARI's losses are not recoverable. Accordingly, it is argued that, **(1)** KAIHARI's alleged lost profits cannot be claimed as damages under the CISG; and, **(2)** The losses suffered by KAIHARI were not foreseeable.

**1. *Kaihari's alleged lost profits cannot be claimed as damages under the CISG***

101. KAIHARI distinguishes between the lost profits which it 'could have realised in a resale' and the lost future profits which include all 'predictably achievable and calculable future profits' [*CL. MEMO., 137, 32*]. It argues that both forms of loss are recoverable under Article 74 CISG. In response, it is argued that, **(i)** It is uncertain whether KAIHARI suffered lost profits; and, **(ii)** It is uncertain whether KAIHARI suffered lost future profits.

**(i) It is uncertain whether KAIHARI suffered lost profits**

102. While lost profits are, in principle, recoverable under Article 74 CISG [*PLASTIC CARPETS CASE; CHINESE GOODS CASE*], KAIHARI is unable to show with sufficient certainty that it *actually* suffered such lost profits. It is a widely accepted maxim that under Article 74 the 'burden for proving the extent of damages lies on the aggrieved party' [*FELEMEGAS, 217; PETROLEUM CASE; MILK PACKAGING EQUIPMENT CASE*].

103. KAIHARI has not been able to offer any evidence that it suffered damages owing to the non-delivery of 5,500 bottles of Mata Weltin Wine [*ANS. ST. CL., 39, 30*]. Indeed, it is explicitly acknowledged in Procedural Order No. 2 that, 'there is no data available presently' and that 'it would be extremely difficult - though not impossible - to calculate the loss/profit made' by KAIHARI [*PROC. ORD. NO. 2, 13, 54*].

104. Further, KAIHARI agreed to buy the Mata Weltin Wine at EUR41.50 [*EX. C 5, 13*], a price approximately 17% higher than the previous year [*PROC. ORD. NO. 2, 5, 53*]. KAIHARI's customers can rescind their orders if the price increases by more than 5% [*PROC. ORD. NO. 2, 6,*

- 53]. It is unclear if KAIHARI passed on this price increase to its customers. If it had, even without VINO VERITAS's alleged breach, 5,700 of its 6,500 pre-orders of Mata Weltin Wine *could* have been rescinded [*PROC. ORD. NO. 2, 7, 53-54*]. As this rescission would have occurred regardless of whether there was a breach, KAIHARI cannot claim this as a loss for the purposes of Article 74 CISG as it does not flow from the alleged breach of the Framework Agreement. KAIHARI has provided no information on whether it increased its price, or whether its customers would have rescinded their pre-orders. Consequently, the full extent of KAIHARI's loss cannot be ascertained.
105. Moreover, at this point in the Arbitration, KAIHARI has chosen not to produce the individual contracts that are available to them, even though they are necessary to determine whether it in fact suffered lost profits or not [*PROC. ORD. NO. 2, 2, 53*]. This is 'in an effort to avoid disclosure of its own customer base' [*ANS. ST. CL., 39, 30*]. These concerns are ill-founded as any publication of the Arbitral Tribunal's award will be 'anonymized' by VIAC and either Party may object to its publication [*ART. 41, VIAC RULES*]. Thus, KAIHARI's decision to not present data on these grounds is illegitimate. KAIHARI refuses to assist the Arbitral Tribunal in determining whether it did suffer this loss. Consequently, KAIHARI cannot claim the damages sought.
- (ii) It is uncertain whether KAIHARI suffered lost future profits**
106. In addition to lost profits, KAIHARI contends that it can also recover its lost future profits as this would be consistent with the 'principle of full compensation' underlying the CISG [*CL. MEMO., 137, 32*].
107. It is not disputed that lost future profits are recoverable in principle under the CISG or the UNIDROIT Principles. However, KAIHARI needs to establish with a 'reasonable degree of certainty' that these losses will arise in the future [*ART. 7.4.3, UNIDROIT PRINCIPLES*]. This requirement is enforced by many domestic jurisdictions such as the United Kingdom and the United States [*SAIDOV, 452*]. Despite this, KAIHARI has not offered any evidence whatsoever to support a

claim for lost future profits. Therefore, these losses are not recoverable.

**2. The losses suffered by Kaihari were not foreseeable**

108. Foreseeability under Article 74 CISG is assessed by determining whether a reasonable person in the position of the party in breach foresaw or ought to have foreseen the relevant loss and its likely extent [*BIANCA/BONELL*, 541; *COOLING SYSTEMS CASE*]. KAIHARI claims that its losses were foreseeable under Article 74, and thus recoverable [*CL. MEMO.* 133, 31]. In making this claim, KAIHARI has addressed the foreseeability of lost profits and lost future profits with the same argumentation [*CL. MEMO.*, 128-134, 30-31].
109. This approach is flawed as lost profits and lost future profits are distinct heads of damages [*ZELLER*, 2009, 121-123]. While, hypothetically, lost profits *may* be foreseeable, it is clear that here lost future profits do not possess as strong a nexus to the breach and thus, in otherwise identical circumstances, may not be foreseeable.
110. With regards to lost profits and lost future profits, KAIHARI argues that certain ‘special circumstances’ of the case, which VINO VERITAS ought to have been aware of, make KAIHARI’s losses foreseeable [*CL. MEMO.*, 130, 31]. Alternatively, KAIHARI argues that VINO VERITAS ought to have known that by departing from industry practice and signing a written agreement, it would eventually breach that agreement [*CL. MEMO.*, 133-134, 31].
111. The arguments are erroneous as they seek to establish the foreseeability of the *breach* of the Framework Agreement and not the foreseeability of KAIHARI’s *losses* arising from the breach. Article 74 CISG requires that the latter be established for damages to be recoverable.
112. In any event, VINO VERITAS contends that KAIHARI’s losses were not foreseeable and are thus not recoverable as, (i) The special circumstances of the case do not make KAIHARI’s losses foreseeable; and, (ii) VINO VERITAS obliging KAIHARI’s request for a written Framework Agreement is not indicative of the foreseeability of KAIHARI’s losses.

113. Before addressing these arguments, VINO VERITAS notes that KAIHARI has relied almost exclusively on *Hadley v Baxendale* as the relevant legal authority for assessing the foreseeability of damages [CL. MEMO., 129, 30]. In international commercial arbitration, Article 74 CISG is the primary authority governing the foreseeability of damages, not the English common law authority of *Hadley v Baxendale*. Indeed, many commentators have specifically noted that although similarities exist, the *Hadley v Baxendale* test is separate from the test under Article 74 [FERRARI, 2009, 188; COOK, 260; MURRAY, 370; ZELLER, 2009, 85-89].
- (i) The ‘special circumstances’ of the case do not make KAIHARI’s losses foreseeable**
- a. VINO VERITAS’ experience in the industry is not relevant in assessing foreseeability in this case**
114. The ‘special circumstances’ upon which KAIHARI relies are, simply, that VINO VERITAS is experienced and successful in its trade of Mata Weltin Wine [CL. MEMO., 130-131, 30-31]. As evidence of this, KAIHARI cites that VINO VERITAS has won the Mediterranean gold medal for its Mata Weltin Wine, sells around 100,000 bottles per year and has customers that have been buying its wine for 40 years [CL. MEMO., 131, 31]. From this, KAIHARI infers that VINO VERITAS ‘knows how to negotiate and enter into a contract’ [CL. MEMO., 131, 31].
115. However, this has no relevance in assessing the foreseeability of KAIHARI’s losses. While VINO VERITAS does not dispute that it is an experienced and successful vineyard, this merely reveals an internal proficiency and not an external awareness of one of its customers’ specific business arrangements, such as KAIHARI’s. This is not sufficient to establish the foreseeability of the losses suffered by KAIHARI.

**b. It was not foreseeable to VINO VERITAS that KAIHARI would be able to resell the goods [NEW ARGUMENT]**

116. Alternatively, it may be argued that VINO VERITAS ought to have known that a buyer of bulk goods, or a retail seller, intends to re-sell these goods for profit [*USED CAR CASE*]. Thus, any lost profit owing to a failure to supply in either of these circumstances would be foreseeable [*PROPANE CASE*].
117. However, what matters here is not that VINO VERITAS ought to have known that KAIHARI would *intend* to resell the goods, but whether they ought to have known that KAIHARI would *be able* to resell them, and at a profit. KAIHARI operates in a ‘highly competitive market’ for wine [*ST. CL., 1, 3*]. These market conditions would affect KAIHARI’s ability to successfully sell its product. Indeed, some of VINO VERITAS’ previous customers either became or nearly became insolvent under similar circumstances [*EX. R 1, 31; PROC. ORD. NO. 2, 34, 57; ANS. ST. CL., 15, 27*].
118. It is unlikely that VINO VERITAS would have speculated into these market conditions, under which KAIHARI operates, and formed the conclusion that they would have sold the Mata Weltin Wine. Consequently, it is also unreasonable to assume that it could have foreseen that its alleged breach would have caused KAIHARI to suffer lost future profits.
- (ii) VINO VERITAS obliging KAIHARI’s request for a written Framework Agreement is not indicative of the foreseeability of KAIHARI’s losses**
119. The crux of KAIHARI’s foreseeability argument is that VINO VERITAS, an experienced and successful vineyard, ought to have known that if it entered into a written agreement and departed from ‘ordinary industry practice’, that it would breach the Agreement [*CL. MEMO., 133-134, 31*].
120. This argument errs significantly in law and fact. In law, this is an argument that is relevant to establishing the foreseeability of the breach. However, it has been explicitly stated that ‘it is the possible consequences of a breach, not whether a breach would occur or the

type of breach, that is subject to the foreseeability requirement of article 74 [CISG]’ [UNCITRAL CISG DIGEST, 35; COOLING SYSTEM CASE; BULLET-PROOF VEST CASE]. Thus, even if it did establish the foreseeability of the breach, this argument is wholly irrelevant to the recoverability of KAIHARI’s losses.

121. KAIHARI’s argument that a departure from industry practice by entering into a written agreement would foreseeably lead to a breach of that agreement also errs in fact. The decision to enter into the Framework Agreement was carefully considered by VINO VERITAS and it fully intended to meet all of its obligations under it. This is clearly evidenced by the fact that it rejected the larger quantity of Mata Weltin requested by KAIHARI in order to ‘ensure that even in bad years [KAIHARI’s] demands could be met by the bottles [VINO VERITAS] normally reserved for itself without affecting the delivery to other customers too much’ [ANS. ST. CL., 7, 25].
122. In conclusion, the arguments presented by KAIHARI are erroneous as they address the foreseeability of the breach and not the loss flowing from the breach. Notwithstanding this, neither the ‘special circumstances’ of the case nor the fact that VINO VERITAS entered into a written Framework Agreement establish foreseeability of the breach, let alone lost profits arising from that breach. KAIHARI has not addressed the foreseeability of lost *future* profits in any capacity, despite advancing such a claim.

**B. Even if it were appropriate for *Kaihari* to claim damages, *Kaihari* cannot claim the additional profit *Vino Veritas* made through its sale to *SuperWines***

123. KAIHARI bases its claim for VINO VERITAS’ profits from its sale to SUPERWINES on two principles. First, KAIHARI argues that its claim is justified so as to ensure ‘full compensation’ [CL. MEMO., 135, 32]. Second, it seeks to rely on VINO VERITAS’ alleged ‘illegal enrichment’ to establish its claim for further profits [CL. MEMO., 141, 33]. When responding to these arguments, the term ‘unjust

enrichment’ will be used when discussing the concept of ‘illegal enrichment’ put forward by KAIHARI.

124. In response, it is argued that, **(1)** The principle of full compensation does not support an award of the kind or quantity of damages KAIHARI is seeking; and, **(2)** KAIHARI cannot rely on the principle of unjust enrichment to claim a disgorgement of profits from VINO VERITAS. For completeness, it is further argued that, **(3)** As a matter of law, there is a general resistance to using Article 74 CISG to award disgorgement of profits; and, **(4)** A disgorgement of VINO VERITAS’ profits from its sale to SUPERWINES is particularly inappropriate.

***1. The principle of full compensation does not support an award of the kind or quantity of damages Kaihari is seeking***

125. KAIHARI seeks to use the principle of ‘full compensation’ to justify its claim for not only damages for lost profit, but for the additional profit VINO VERITAS made through its sale of Mata Weltin Wine to SUPERWINES [*CL. MEMO.*, 135, 32]. This claim is built upon a false assumption because, even at its most expansive, compensation can only be ‘for all disadvantages suffered as a result of the breach of contract’ [*SCHWENZER/SCHLECHTRIEM*, 1000]. Properly applied, it places the party in the same economic position it would have been in had the breach not occurred [*CISG ADVISORY COUNCIL*, 3.12].
126. In its claim for VINO VERITAS’ further profits, KAIHARI has sought compensation greater than the loss it in fact suffered [*ST. CL.*, 26, 7]. It is therefore not seeking full compensation, but overcompensation for its losses. Regardless of any other potential justification for such a claim, this undermines the principle of full compensation. Consequently, the principle of full compensation should in fact limit, not expand KAIHARI’s claim.

***2. Allowing Kaihari to claim a disgorgement of profits would unjustly enrich Kaihari, not VINO Veritas***

127. KAIHARI also argues that it is entitled to ‘further profit’ as this would represent the amount by which VINO VERITAS was unjustly enriched [*CL. MEMO.*, 141, 33]. This claim is ill-founded for three reasons, **(i)** The CISG does not, in these circumstances, allow an award of

damages to be made on the basis of unjust enrichment; **(ii)** Even if it were available in principle, VINO VERITAS was not unjustly enriched by its transaction with SUPERWINES; and rather, **(iii)** Such an award would unjustly enrich KAIHARI.

**(i) The CISG does not, in these circumstances, allow an award of damages to be made on the basis of unjust enrichment**

128. Article 74 CISG provides that damages consist of a sum equal to the loss suffered by the aggrieved party as a consequence of the breach. Accordingly, a gain made by the party in breach, or its ‘unjust enrichment’, is not relevant to the quantification of damages under Article 74 but rather relates to an award of restitution under Article 84 [*GOTANDA, 120; KONERU, 127*]. Restitution is ‘designed to reverse the other party’s gain and not to compensate for the claimant’s loss’ [*KRÖLL/MISTELIS/PERALES, 1116*].

129. Article 84 CISG allows the *seller* to recover, as part of its claim for restitution, ‘all benefits’ the buyer has ‘derived from the goods or part of them’ where the contract has been avoided under Article 49. This process is distinct from the quantification of damages under Article 74. Article 84 does not apply as the Framework Agreement has not been avoided and VINO VERITAS, not KAIHARI, is the seller of the Mata Weltin Wine for the purposes of this Agreement. Accordingly, Article 74 does not allow for a claim of unjust enrichment and so the CISG is unavailable in these circumstances.

**(ii) Even if it were available in principle, VINO VERITAS was not unjustly enriched by its transaction with SUPERWINES**

130. Unjust enrichment exists ‘to prevent a [party] from retaining ... some benefit derived from ... another’ where that benefit was improperly received [*FIBROSA, 61; CHAMBERS/MITCHELL/PENNER, 103*]. Indeed, ‘it attaches only to those benefits that the defendant materially received from the plaintiff’ [*CHAMBERS/MITCHELL/PENNER, 104*]. This benefit must lead to the defendant being enriched at the expense of the claimant [*DEGELING/EDELMAN, 2*]. Accordingly, the majority of cases in which unjust enrichment has been found are cases where

a party has, for instance, received money or a service and consequently profited from the money or service without paying for it [*NEYERS/MCINNES/PITEL, 170-172*].

131. Here, KAIHARI is trying to claim VINO VERITAS' profits resulting from a sale to a third party [*CL. MEMO., 140-141, 32-33; ST. CL., 26, 7*]. For these profits to have constituted an unjust enrichment, VINO VERITAS' profit must have been a consequence of improperly receiving or obtaining a proprietary interest in the Mata Weltin Wine. However, KAIHARI neither received title to the Mata Weltin Wine, nor paid VINO VERITAS for that title. Indeed, no specific contract was ever formed for the sale of the Mata Weltin Wine. Rather, the existing dispute between the Parties is in relation to the original Framework Agreement, which did not transfer title of the Mata Weltin Wine.
132. Therefore, VINO VERITAS never received a benefit from KAIHARI. Though it did allegedly breach the Framework Agreement, this contract did not, in and of itself, confer a proprietary right upon KAIHARI [*EX. C 1, ART. 3, 9*]. After its alleged breach, VINO VERITAS merely retained and exploited an opportunity that was available to it. Consequently, this case is not one of unjust enrichment. Even if such a claim were possible under the CISG, KAIHARI would not be entitled to any damages beyond those equal to the loss it suffered.

**(iii) Such an award would unjustly enrich KAIHARI [NEW ARGUMENT]**

133. As, in these circumstances, a claim for unjust enrichment is unavailable under the CISG, recourse to the UNIDROIT Principles, as the relevant domestic law of Danubia, is available [*Art. 7(2) CISG; ANS. ST. CL., 38, 29; MACROMEX CASE*]. Although Article 7.4.2 UNIDROIT Principles allows for full compensation of the aggrieved party, this is subject to some limitations [*SICA, 2.3*]. The official Comment 3 on Article 7.4.2 notes that 'the aggrieved party must not be enriched by damages for non-performance.' Such enrichment refers to situations where the party would be put in a better position than it would have been, had the contract been performed [*KERR V. BARANOW*].

134. Unjust enrichment compensates the aggrieved party for more than the loss it suffered [KRÖLL/MISTELIS/PERALES, 1116]. By its very nature, then, an award that strips VINO VERITAS of its further profits would exceed the actual loss KAIHARI suffered. It would thus place KAIHARI in a position where its gain would be greater than the loss it suffered. Therefore, a disgorgement of VINO VERITAS' further profits would be inconsistent with Article 7.4.2 UNIDROIT Principles and is unavailable.

**3. As a matter of law, there is a general resistance to the awarding of damages in the form of a disgorgement of profits [New Argument]**

135. KAIHARI could argue that disgorgement is a tool that has found increasing acceptance in domestic matters, and is closely tied to the principle of unjust enrichment [PAVEY & MATTHEWS V PAUL; FARAH CONSTRUCTIONS V SAY-DEE; SEMPRO METALS; RATHWELL V RATHWELL; BGH NJW 2006 2847].

136. However, rulings in domestic courts are not determinative of the remedies available in international commercial arbitration [FERRARI, 1999, 246]. Indeed disgorgement remains a radical tool, as its implicit purpose is to punish the party for any profits arising from its breach as opposed to merely seeking to reimburse the other party for any losses it has suffered [NEYERS/MCINNES/PITEL, 334; ATTORNEY-GENERAL V BLAKE].

137. For this reason, claims for a disgorgement of profits are an inappropriate application of the CISG. Many commentators have noted that disgorgements of profits are contrary to the compensatory nature of awards under Article 74 CISG [BRIDGE, 611; BIANCA/BONELL, 548]. Schwenger and Schlechtriem noted that, 'There is currently general agreement amongst German authors that Article 74 does not grant a claim for the disgorgement of profits acquired by the party in breach' [SCHWENZER/SCHLEICHTRIEM, 1017]. The words of Article 74 are clear: 'Damages ... consist of a sum equal to the loss'. An award of a disgorgement of profits would deviate from

what is acceptable under this provision, and thus should not be awarded.

**4. A disgorgement of *Vino Veritas*' profits from its sale to *SuperWines* is particularly inappropriate**

138. Even if an award for disgorgement of profits were available in principle under the Article 74 CISG, such an award should not be granted in these circumstances. This is because, **(i)** A disgorgement in this circumstance would be punitive in nature; and, **(ii)** This request for a disgorgement is inconsistent with Article 7(1) CISG.

**(i) A disgorgement in this circumstance would be punitive in nature**

139. It is widely acknowledged that Article 74 CISG does not allow for punitive damages [*BIANCA/BONELL*, 544; *CISG ADVISORY COUNCIL*, 9.5], even if they are allowed under the relevant domestic law [*CISG ADVISORY COUNCIL*, 9.5]. An award for damages is considered punitive when it provides the aggrieved party a sum greater than the actual loss it suffered 'in order to punish a party' in breach [*CISG ADVISORY COUNCIL*, 9.5].
140. In this case, KAIHARI claims that its loss 'should not be below EUR 110.000' [*ST. CL.*, 26, 7]. However, this estimation is inaccurate. KAIHARI was able to avoid much of its loss by purchasing Vignobilia Ltd.'s diamond quality wine [*PROC. ORD. NO. 2, 11, 54*]. It purchased this wine at a price only EUR0.70 greater than the price it accepted from VINO VERITAS [*PROC. ORD. NO. 2, 11, 54*].
141. Even at the most conservative rumoured premium of EUR15.00 per bottle [*PROC. ORD. NO. 2, 24, 56*], the profit VINO VERITAS likely made from its sale to SUPERWINES would be far greater than any lost profit suffered by KAIHARI. A full disgorgement of VINO VERITAS' profits would thus grossly overcompensate KAIHARI and unfairly punish VINO VERITAS. It would not be a 'sum equal to the loss', as Article 74 CISG requires. Rather, this award would be contrary to the very spirit of the CISG.

**(ii) This request for a disgorgement is inconsistent with Article 7(1) CISG**

142. KAIHARI is bringing a claim for a disgorgement of profits, despite having access to the documents needed to calculate their loss [*PRO. ORD. NO. 2, 2, 53*]. This claim necessitates the Arbitral Tribunal's use of discretion to assess the extent and likelihood of the loss suffered. There is a necessary speculation that must occur to make this assessment without proper evidence. Honnold argues that 'situations that could permit a party to speculate at the other's expense' are inconsistent with the good faith requirements of Article 7(1) CISG [*HONNOLD, 95*]. Here, KAIHARI is seeking to rely on speculation where it could clarify the existence of its loss, thereby acting in a manner contrary to the principle of good faith. Therefore, to give proper regard to the observance of good faith, a disgorgement of VINO VERITAS' profits should not be allowed.

**Kaihari's alleged losses do not satisfy the requirement of foreseeability under Article 74 CISG. Indeed, it cannot be said with any certainty that Kaihari has suffered any loss whatsoever. Even if the Arbitral Tribunal adopts the view that Article 74 is satisfied and that Kaihari has suffered loss that is recoverable, a disgorgement of profits is inappropriate as it would unjustly enrich Kaihari.**

**Prayer for Relief**

For the reasons provided in this Memorandum, VINO VERITAS respectfully requests the Arbitral Tribunal to find that:

1. The Arbitral Tribunal does not have the necessary power to order VINO VERITAS to produce the documents requested by KAIHARI and should not make such an order;
2. KAIHARI is not entitled to US\$50,280.00 in damages for litigation costs; and,

3. KAIHARI cannot claim a disgorgement of the profits made by VINO VERITAS.

# Book Reviews

**Christina Do, Business, Law and Regulation: A Custom Publication for Curtin Law School, LexisNexis Australia, 2015, 402 pages, ISBN 9780409342345, \$105.00 AUD Hardback copy.**

### **Introduction**

As domestic and international economies alike are continually acclimatizing to shifting market conditions, likely influencing the livelihoods of its constituents within; Christina Do's 'Business, Law and Regulation' greatly succeeds in shedding light on one of the most prominent, yet provocative determinants which influence a nation's economy; the government's regulation of the business sector. For law students, it is a significant topic of much debate within both the legal and financial industry concerning whether the government is regulating business at an optimal level. In theory, an economy is ostensibly one that is operating at an efficient yet effective level, inspiring both domestic and international trade. Yet, to what lawful extent should a government have control over a nation's economy? This book provides an excellent service in educating its readers on the ten prominent regulators of businesses in Australia and the corresponding regulatory levels in which they operate. The book sparks the readers interest on the subject matter, it stimulates their critical thinking and subsequently encourages their ability to evaluate the effectiveness of the Australian government in controlling a large component of its business sector.

### **Main Points and Analysis**

Christina Do (LLM, LLB, BCom, GDLP) is a Lecturer at Curtin University and a publisher in the field of commercial regulation. These positions have enhanced her ability to effectively articulate the subject matter of business, law and regulation to her readers. Do's publications in the fields of corporate governance, the foundations of the legal systems and the accompanying fundamentals of government regulatory roles have further facilitated her ability to provide tangible substance from a number of diverse authors, providing the book's

informative content.<sup>1</sup> As briefly mentioned above, commercial regulation is a subject matter that is fundamental to the critical understanding of many prospective lawyers. Students must cognitively understand that the three functioning columns of a nation (government, society and business) should be interconnected for a country to operate at an optimum capacity and thus subsequently benefit a majority of its populace within. However, each of these pillars can be perceived in a subjective light, embodying different roles and thus making cohesion a likely uncommon occurrence.

Examples of this may reside with the conflicting interests between a business and an individual in society with respect to the legislature's policy-making. While governments may elect to reflect some of their policies with the vast majority of constituents whom are responsible for the government's support and re-election, businesses may perceive different ideologies and thus may not be accommodated for in respect to a political decision. Furthermore, the government's acknowledgement of the public's interests should also extend to the capital interests of the commercial sector. The essential roles that businesses provide in stimulating the economic wealth of a nation are functions in which society as a whole are heavily dependent upon.

Thus, the purpose of Do's textbook compilation is to educate students on how the actions of Australia's three core pillars interchangeably affect one another through both direct and inadvertent means. This is facilitated through the presentation of Australia's ten main regulators and how the introduction of these regulators, or their continuing operation, have derived from the subsequent influence of these pillars. The textbook consists of 10 topics, covering the 10 main regulators in the Australian jurisdiction while also providing an additional chapter on Alternative Dispute Resolution (ADR) and its importance as a remedy outside of litigious avenues.

---

<sup>1</sup> See Christina Do, 'Organic food labelling in Australia: A 'Murky' Environment' in need of reform' (2015) 34(1) *University of Queensland Law Journal* 123–137.

Do's textbook begins by introducing the general foundations of an effective nation in respect to its three core pillars of society, government and business. These pillars do not 'exist in a vacuum,' they are interdependent as their respective decisions can both directly and indirectly affect each other.<sup>2</sup> In short, the Australian government is established by the *Australian Constitution* and is founded and governed by a constitutional monarchy. However, the Australian government does possess the authority to enact laws at both a federal and state level.<sup>3</sup> When enacting laws, the government should acknowledge its role as a representative of the people and thus be responsible to ensure policy decisions reflect the public's interest.<sup>4</sup>

Businesses can vary from an individual 'sole trader' to a company incorporated under the *Corporations Act 2001* (Cth). Business as a pillar can be defined as a 'going concern' for commercial interests.<sup>5</sup> However, the operation of businesses within a nation can also extend to benefiting the interests of the public in providing goods, services, employment and the overall stimulation of the economy in respect to domestic and international trade. The core pillar of society is identified in this book with respect to regulation as being a 'provision of delegated legislation, made pursuant to an Act.'<sup>6</sup> Furthermore, varying levels of regulation exist from self-regulation (voluntary compliance towards industry standards) to government regulation (compulsory compliance towards government laws). As to what level of regulation is appropriate is a subjective test related to each specific circumstance which the reader is encouraged to critique. When weighing up the level of regulation, the government, and subsequently the reader will learn to assess each situation to ascertain whether the benefits of enforcing a regulation will outweigh the costs of a laissez-faire approach. This topic provides an excellent introduction to the rest of the book by setting a scene as to why

---

<sup>2</sup> Christina Do, *Business, Law and Regulation – A Custom Publication for Curtin Law School* (LexisNexis Butterworths, Australia, 2015) 16. *Australian Constitution* s 51.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Hope v Bathurst City Council* (1980) 144 CLR 1, 8.

<sup>6</sup> Ray Finkelstein and David Hamer (eds), *Concise Australian Legal Dictionary* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2015) 540.

regulation exists while also inviting the reader to question the validity of regulation as an effective source of societal control.

The books coverage of the Australian Securities and Investment Commission's (ASIC) functions are comprehensive, including its ability to 'ensure that Australia's markets are fair and transparent' by regulating those who work in 'investments, superannuation, insurance, deposit taking and credit.'<sup>7</sup> The powers of ASIC include (but are not limited to) its ability to gather information via any lawful manner, act as a registry under the Corporations Act, delegate power to a member of the commission and perform an examination of a person where ASIC has 'reasonable ground to believe' that a person can give information applicable to an investigation.<sup>8</sup> Do's book also sheds light on ASIC's discretionary powers regarding its ability to modify the *Corporations Act 2001* (Cth) with each particular situation such as takeovers, acquisitions or shareholdings.<sup>9</sup> Overall, the coverage of ASIC's powers, its functions in society and its scope is particularly comprehensible and thus provide the reader with a detailed illustration of ASIC's operations as one of Australia's most prominent market regulators.

Topic 3 directs its coverage towards the current Taxation framework in Australia and the Australian Taxation Office (ATO) that is responsible for regulating its processes. With a taxation system of over 125 Australian government taxes consisting of income, goods, services and resource taxes, Australian taxpayers are faced with an increasingly complex, yet progressive system that is financially adequate for both the state and its constituent's wellbeing.<sup>10</sup> After studying this chapter, the reader will likely have an inclusive understanding as to how and why a tax structure exists in society and

---

<sup>7</sup> *Australian Securities and Investments Commission Act 2001* (Cth) s1(2).

<sup>8</sup> *Ibid* s 13, 102(1), 19.

<sup>9</sup> *ASIC v DB Management Pty Ltd* (2000) 199 CLR 321.

<sup>10</sup> Australia's Future Tax System: *Architecture of Australia's future tax system*, xii, <<http://www.taxreview.treasury.gov.au/>>.

will likely also begin to critically evaluate the appropriateness of Australia's taxation system and its requisite need for reform.

Readers are also encouraged to understand and evaluate the effectiveness of both the Fair Work Commission (FWC) and Ombudsman (FWO) in regulating the quality of industrial relations, arrangements and workplaces which exist in Australia. Furthermore, Do's textbook effectively illustrates the juxtaposing functions between the FWC and FWO while also linking their complementary tasks in promoting and administering the fair working conditions of Australians. Readers will ascertain that the FWC assumes the role of an industrial tribunal, assisting the resolution of industrial disputes, modern awards and collective bargaining agreements, amongst other functions.<sup>11</sup> Moreover, the textbook articulates the differences between the FWO and the FWC in that while the former administers the *Fair Work Act 2009* (Cth), it contrastingly focuses on the education and guidance of workplaces in adhering to that Act as opposed to carrying out an investigatory role.<sup>12</sup>

Intellectual Property Australia (IPA) is covered within topic 5 as readers are introduced to a somewhat complex and intangible area of law. The chapter presents a comprehensive yet succinct overview of IP to the reader. It highlights that while the variety of creative endeavours have increased and thus the heightened scope of IP law has subsequently followed, the definition of IP has maintained its ambiguity.<sup>13</sup> Nonetheless, the reader receives enlightenment as to why IP has been historically difficult to define, how the development of IP law has progressed in Australia through the *Copyright Act 1968* (Cth) and how IP is generally classified within the Australian jurisdiction. The chapter touches briefly on IPA at a glance, describing the institution's function as an administrator of the four IP classification regimes in Australia.<sup>14</sup> However, the chapter's coverage

---

<sup>11</sup> *Fair Work Act 2009* (Cth) s 576(1)–(2).

<sup>12</sup> *Ibid* s 682.

<sup>13</sup> Christina Do, *Business, Law and Regulation – A Custom Publication for Curtin Law School* (LexisNexis Butterworths, Australia, 2015) 97 [1.1].

<sup>14</sup> *Ibid* 108.

of IPA is somewhat limited. It does not educate the reader on IPA's processes for examining a design, patent or trademark through their respective statutory regulations for approval, it primarily focuses on conveying the legal scope of IP within Australia.

Arguably the most prominent regulator in Australia, the Australian Competition and Consumer Comissions (ACCC) is responsible for (but not limited to) protecting the interests and safety of consumers whilst also maintaining and promoting the lawful competition of businesses in the Australian market.<sup>15</sup> Covering both consumer and competition law, topics 6 and 7 are definitive sources for any reader interested in learning about the two divisions of the ACCC. Located in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (CCA), the Australian Consumer Law (ACL), Chapter 5 provides the ACCC and its consumers with the requisite power to address breaches of the law that are of non-criminal in nature.<sup>16</sup> Furthermore, the ACCC is also empowered through the CCA in respect to investigation, enforcement and prosecution via civil and criminal avenues.<sup>17</sup> In regards to competition law, the ACCC attempts to regulate its markets through its compliance pyramid. The compliance pyramid provides the necessary steps the ACCC should take to ensure compliance with the CCA before it pursues litigation proceedings.<sup>18</sup> The book also explores the ACCC's legislative powers with respect to criminal and civil orders, the standard of proof needed for the ACCC to initiate proceedings and the subsequent penalties which may arise from the proceedings. Overall, readers will receive a greatly detailed description of how competition and consumer laws are regulated in Australia.

---

<sup>15</sup> ACCC and AER, *Annual Report 2011-12*, Commonwealth of Australia, Canberra, 2012, 19.

<sup>16</sup> Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth) [14.7].

<sup>17</sup> See *Competition and Consumer Act 2010* (Cth) s 155.

<sup>18</sup> ACCC, *Compliance and Enforcement Policy*, Commonwealth of Australia, Canberra, 2012, 4–5.

As society has progressed, the gap between the core pillars of businesses and society have become increasingly indistinguishable. Many businesses have formed obligations within their respective communities to reflect a socially responsible approach. This theme of corporate social responsibility (CSR) has subsequently extended to the notion of environmental conservation, particularly the act of regulating and enforcing such environmental activity through federal governance. Topic 8 provides a detailed overview of the Australian government's jurisdiction in respect to environmental protection while also stipulating the remedial avenues that Australia's regulatory authorities can pursue in order to enforce such action. The textbook does not specifically focus on Australia's principal Clean Energy Regulator (CER) and its administration of the carbon pricing mechanism and Emissions Reductions Fund, however this is likely a result of the regulator's insertion conflicting with the period of the book's publication. However, the chapter provides the reader with an excellent summary of the 3 different avenues in which regulatory authorities can enforce such environmental conservation: via administrative orders, prosecution through criminal enforcement or through civil remedies.<sup>19</sup>

In an increasingly litigious society, it is imperative that businesses not only abide with Occupational Health and Safety (OHS) standards but are also attentive to safety concerns in order to ensure that their workplaces are safe for their workers. Following a similar theme as the rest of the book, Topics 8 and 9 begin by providing a contextual coverage of OHS law throughout Australia's history, including the object, scope and outline of the current *Work Health Safety Act 2011* (Cth) (WHS Act).<sup>20</sup> A particular emphasis is placed on the duty of care owed in a workplace, particularly by the 'business operator' and to what scope the duty in respect to their workers.<sup>21</sup>

---

<sup>19</sup> Christina Do, *Business, Law and Regulation – A Custom Publication for Curtin Law School* (LexisNexis Butterworths, Australia, 2015) 295 [18.1].

<sup>20</sup> *Work Health and Safety Act 2011* (Cth) s 3(1).

<sup>21</sup> *Ibid* s 19.

Similar to the book's coverage of IP law, the chapter primarily focuses on the scope of safety law in Australia with respect to civil and criminal proceedings pursued by authorities, such as WorkCover, to ensure enforcement. However, it does not highlight the functions of statutory authorities such as Work Safe Western Australia (WA) or Safe Work Australia who are regulators responsible for investigating and ensuring compliance with the WHSA. Yet, readers do receive information on the specific powers of inspectors under the WHSA and thus the subsequent functions that they perform in society as an OHS regulator.<sup>22</sup>

### **Evaluation**

Christina Do's *Business, Law and Regulation* is an informative, concise and practical publication which performs its purpose well in reflecting how Australia's government, business and society interchangeably influence each other to reflect the nation that exists today. The education of Australia's 10 main regulators, all stemming from varying aspects of Australia's corporate world, provides the reader with practical legal knowledge of how a nation's core pillars can indirectly or advertently reflect the varying lawful powers of a regulator, contingent on its purpose in society and business. While the focus of the textbook is predominately on Australia's corporate world, and scarcely the small businesses within, the book does provide integral background knowledge of how the legislatures policy-making regarding large corporate firms eventually trickles down to influence the operations of dependent small businesses in a similar market.

For both legal practitioners and students alike, providing an investment into reading Christina Do's *Business, Law and Regulation* will not be a misuse of both time and monetary contribution. This book successfully educates those interested in comprehending the fundamentals of both how and why commercial regulation exists in Australia.

---

<sup>22</sup> Ibid pts 8, 9.

Ben Ridgwell

**Djakhongir Saidov, *Conformity of Goods and Documents: The Vienna Sales Convention*, Hart Publishing, 2015, ISBN 9781849461559, 285 Pages**

## **Introduction**

This book provides an insightful analysis of the United Nations Convention on Contracts for the International Sale of Goods (CISG), relating specifically to common questions that arise with respect to CISG and case law. The main questions analysed focus on conformity of goods and documents. Intended for legal professionals, academics and students, the book is an excellent resource; the author writes eloquently but simply, lending clarity and understanding to a complex subject matter.

The book focuses primarily on certain provisions pertaining to the seller and their duty in regards to goods and documents. Conformity under art 35 and the requirement of goods to be free from claims of third parties under arts 41 and 42 are analysed in detail. In addition, the author investigates the requirements of a conforming good or document under the CISG. The author presents this comprehensive investigation through an extensive analysis of case law from Argentina, Australia, Austria, Belgium, Canada, China, Czech Republic, Denmark, Finland, France, Germany, Greece, Israel, Italy, Mexico, Netherlands, New Zealand, Russia, Serbia, Spain, Sweden, Switzerland, the United Kingdom and the United States. In addition, the text references international arbitration cases under the ICC and scholarly commentary.

Dr Djakhongir Saidov (PhD) (LLM) (LLB), who at the time of writing was Reader in Law at the University of Birmingham, now tasks as a Professor of Commercial Law at King's College London. The author is evidently extremely knowledgeable on the topic and well equipped to provide an in depth analysis on the issue of conformity of goods and documents under the CISG. He also holds the position of Reporter to the Council on the CISG Advisory Council, regarding the areas of Conformity of Goods, Public Law Regulations and Industry Standards.

## **Main Points**

Chapter 1 introduces the CISG, outlining briefly its history and significance. This chapter also examines key provisions of the CISG. Discussion of its' relevance in modern business environments and ongoing legal developments highlight the CISG's importance and its prospects. The author outlines the objective of the book, which is to provide an extensive examination on the area of goods and documents under the CISG and the seller's duty in relation to these. An overview provides the reader with a list of topics covered by the text, emphasising the seller's obligation in fulfilling a sales contract relating specifically to the goods and documents required. An explanation on conformity of goods is detailed to give the reader knowledge and for better understanding of later chapters. Although the book does not aim to analyse the remedies under the CISG, an overview is provided for in the introduction, to again assist the reader in understanding subsequent chapters. The chapter concludes with a more extensive discussion of the CISG.

Chapter 2 explores the relationship between the sales contract and conformity of goods under the CISG. The author observes that the contract can establish the standard for conformity of goods. The text confirms that this redresses some of the main restrictions on conformity under the CISG. The chapter analyses the need for contract interpretation in determining the seller's conformity duty. It looks at pre-contractual representations and conduct including puffery and opinion, statements made in advertisements, discussion between the buyer and seller prior to the contract and the buyer's knowledge. The discussion on the buyer's knowledge is quite important and the author determines whether art 35(1) is relevant to art 35(3), explaining that this was not the intention of the provision. Several case examples are used to identify whether an examination of the goods and the buyer's knowledge prior to the completion of the contract can affect the seller's duty to conform.

The chapter proceeds to discuss post-contractual statements and conduct which can assist in understating contract requirements. Description of goods and documents is mentioned as one of the more important conformity elements to determining the seller's

obligations. A discussion of civil law and English law ambiguities illustrates the relevance of the CISG. The role of contract interpretation is again highlighted here in addition to the primacy of surrounding circumstances. Quality is explored in significant detail, particularly the complexities involved and how this can be reduced through industry or public law standards. The seller's liability for lack of conformity to quality is also addressed as to when, under the CISG, any non-conformity is no longer the seller's liability. Guarantee and durability are also analysed, followed by an exploration of when quantity and packaging under art 35(1) will be classified as the seller's breach of the contract.

Chapter 3 covers fitness for a particular purpose and seller's implied rules in regards to conformity of goods under art 35(2). The legal nature of these implied terms are explored and the author conveys their importance beyond merely contract interpretation. The general considerations of art 35(2)(b), under which goods are intended for a particular purpose and the seller is aware of the intended purpose is discussed. In addition, assumption of risk and reliance in relation to this provision are examined. The relationship between arts 31(1) and 35(2)(b) is noted, and it is concluded that the provisions should be interpreted and differentiated between, which essentially influences the outcome of whether or not the seller is liable for non-conformity of goods where the goods are not fit for their purpose. An extensive consideration of how to define a 'particular purpose' is conducted to establish when exactly a 'good' attracts this requirement. The requirement that the purpose be communicated is the main criterion. The chapter then moves to consider the international aspect of sale contracts under the CISG.

The author discusses the issue of location and whether the seller has a duty to ensure the goods comply with circumstances relevant to the location of where they will be sold. The *New Zealand Mussels* case<sup>1</sup> presents as a criterion for determining where the seller's obligations

---

<sup>1</sup> Bundesgerichtshof [German Federal Supreme Court], VIII ZR 159/94, 8 March 1995.

arise and expire. The conditions are further explored through other cases relating to public law regulations. A discussion follows as to when the seller will be liable for non-conforming goods under industry standards and standards adopted by private entities and trade associations. Climate and cultural conditions are also assessed under art 35(2)(b).

The author then examines the durability aspect of goods and whether the seller has a duty to ensure goods fit for purpose for a particular time. The author examines this through art 36(2) and how it applies to art 35(2)(b). The common example of transportation of goods is discussed. The element of communicating the purpose (that is, making it known to the seller) is examined as either expressly or implicitly. The author summarises that the buyer should communicate as clearly as possible the intended purpose. The chapter assesses the reliance on the seller's skill and judgement. Here, the author examines whether the buyer's reliance on the seller's skill and judgement effects the seller's duty to abide with the particular purpose. Defences available, various circumstances affecting reliance and the level of reliance form this discussion.

The chapter concludes with a discussion of the relevant burden and standard of proof. It is concluded that the burden of proof lies with the buyer to evidence that the particular purpose was appropriately transmitted to the seller. It lists the anomalies for the burden of proof; the issue of reliance, the 'rule and exception' principle and 'proof proximity'. The author confirms that standard of proof should be governed by the CISG and not domestic law. The chapter ends with conjectures and comments by the author on admissibility of evidence and whether they should be regulated under the CISG.

In Chapter 4, fitness for ordinary use is analysed. It is in this chapter that art 35(2)(b) is examined and it begins with a brief but concise discussion on the relationship between this article and art 35(2)(a), which was analysed in the previous chapter. The chapter explores whether goods under art 35(2)(b) have to conform to quality specifications. The author establishes how a specification of quality could be of use in the CISG, although it is not paramount. The text then looks at the contrasting point, which establishes that quality is

essential, examining the types of quality tests through case law examples, weighing up the positives and negatives of each.

A detailed discussion spanning several pages defines ‘ordinary use’ through case law examples. The chapter then focuses on the influence description has on the definition of ‘ordinary use’. A discussion on durability for goods fit for ordinary use is then determined and explained before moving to health and safety, where under art 35(2)(a) it is considered that non-conformity will generally be a breach by the seller. It also examines when the seller will not be liable. The text analyses conformity to supply information through instructions, manuals and labels. A smaller discussion on servicing and separate parts and whether the seller has an obligation to provide this is made in the chapter. Whether minor defects and appearance effect the ordinary use of goods is also explored.

Public law regulations are then explored through the *New Zealand Mussels* case,<sup>2</sup> which is prominent in the subject area. The need to examine cases individually in determining if conformity is affected by changes to public law regulations, the legal nature of public law regulations and their enforcement is examined with particular reference to this case,<sup>3</sup> but also other case law examples. A debate on public law regulations and whether art 35(2)(b) is more appropriate than art 35(2)(a) follows. The author concludes that art 35(2)(b) would implicate a consistent application of the CISG and it should not be examined further. Similar to the previous chapter, this chapter finishes with proof and the difficulties associated with the buyer proving that the seller did not conform to the goods being fit for ordinary use.

Chapter 5 presents an interesting discussion on whether the seller, providing the buyer with a sample or model, is obliged to conform to the standard of the sample or model. The chapter focuses on art 35(2)(c) and whether non-conformity to the sample or model is a

---

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

breach under the provision. There is also a discussion on whether the sample or model standards or those provided for in the contract are necessary for the seller to conform to. Again public law regulations are discussed, as in previous chapters, as well as a discussion on proof. The second part of this chapter concerns packaging. The purpose of packaging is discussed and provisions within the CISG, arts 35(2)(d) and 36(2) in particular are explored in detail. The seller's duty to comply with packaging is addressed through a 'usual manner' and an 'adequate manner' of packaging the goods. Also addressed are the circumstances where the seller will be liable for defective packaging to conforming goods. The burden of proof lies with the buyer and this is discussed in detail, relevant to how and what evidence the seller will need in order to prove a breach.

The chapter then delves into the exemptions from liability. Articles 35(2) and 35(3) are discussed in detail and the seller's exemption from liability is discussed through the buyer's knowledge. Article 39 is briefly considered, although not in detail, as it is not a focal point of the text. However, the author does acknowledge that this provision is another means of exempting the seller. The chapter concludes on a discussion of disclaimers and presents the debate on whether disclaimers should be governed under the CISG or domestic law as a validity issue.

Both chapters 6 and 7 explore third parties' rights or claims. Chapter 6 looks at art 41 which confers the seller's duty to ensure the goods are independent from third parties' rights or claims. The author examines the link between arts 30 and 41, although conveys that they are in fact different. Article 41 is deconstructed and explained in significant detail and differentiates between third parties' rights and claims, providing significant information on both. The relevant time in which the rights or claims must be made is also explored. The author then addresses a different scenario pertaining to third parties' rights or claims disconnected to the goods. A discussion on the impact this has on the buyer using the goods proceeds. An analysis of the seller's rights or claims is also covered in the chapter before moving onto exemptions.

The exemptions section in the chapter covers circumstances where the seller will not be liable under art 41. These exclusions are considered under ‘buyer’s agreements’, where the buyer agrees to accept the goods with third party rights or claims. The second exception discussed is ‘buyer’s notice’ and the last exemption is ‘exclusion clauses’ as permitted under art 6. The chapter concludes with a discussion of domestic rules on validity, considering when domestic rules should apply to these matters in contracts regulated by the CISG. Chapter 7 dissects art 42, relating to third parties’ rights or claims arising from intellectual property. The author stipulates the manner in which the CISG separates rights or claims in respect of the goods (art 41) and those arising from intellectual property (art 42). The chapter addresses the categorisation of intellectual property rights or claims under art 42. Similarly, to the previous chapter the author discusses the phrase ‘rights or claims’ and goes into more detail on frivolous claims, relevant time and the seller’s knowledge.

Observing art 41 from a different angle, the text explores territorial restrictions which implicate liability beyond the requisite knowledge. A detailed discussion of the seller’s exemption from liability is examined through the buyer’s knowledge of third parties’ rights or claims, compliance with the buyer’s specifications, occasions where notice is not given to the seller and when the notice requirement is omitted by both parties. Burden of proof is then discussed under the buyer’s duty. The author presents a summary of findings from the analysis of art 42. The chapter concludes with a thoughtful comparison of arts 41 and 42 and whether they are conformity duties on the seller’s part, similar to that in art 35. The author identifies the similarities, but also notes the distinct difference and identifies why arts 41 and 42 are not conformity requirements.

Finally, chapter 8 focuses on conformity of documents. The chapter commences with an introduction to the role played by documents, particularly in the area of international sales law. A summary of typical documents is then provided. The text covers transport documents; the author contrasts bills of lading, sea and airway bills, consignment notes, straight bills of lading, delivery order and multimodal transport documents. Other documents, such as receipts,

warrants, insurance, indemnity and certificates, are also analysed. The chapter then assesses specific obligations of document conformity. The requirement to deliver essential documents in addition to the goods is noted. The issue of what documents are to be delivered to the buyer from the seller is explored in the instance where the contract does not clearly state this. The contractual requirements pertaining to conformity of transport documents is addressed as well as the instance where the contract does not mention this.

Quality, quantity, origin and other certificates are then dealt with in more depth, evidencing the important role they play in conformity. Common occurrences and cases in relation to this are explained, such as the situation where the function of the certificate is not conveyed. The nature of a finality clause is also discussed. Certificates as extra-contractual documentary evidence determine the instances where certificates can be used for non-conformity. The author concludes the chapter with a summary of the emerging themes, such as the role of the CISG in assisting in contractual interpretation and the seller's documentary obligations and the need for contracts to explicitly state the duties pertaining to documents on the part of the seller. Whether external circumstances should be included in determining conformity is inferred as being case dependent. A conclusion is provided on the issues associated with hearing circumstances regarding certificates, noting its effect on party autonomy and legal uncertainty. In the last paragraph, the author expresses the need for refinement and development with regards to the CISG's handling of documentary situations, allowing for a more consistent application of the CISG's provisions on contract interpretation.

### **Analysis**

The purpose of the book is to examine key provisions in the CISG, providing an in depth analysis which is not prominent in the current library of cases and commentaries. Specifically, the book seeks to address the duty of the seller in regards to conformity of goods and documents under the CISG. The chapters sufficiently detail and explore the key elements pertaining to conformity of goods and documents in a logical and skilled literary approach. The audience can grasp conclusions and common questions addressed thanks to the

concise writing style employed by the author. The breakdown of chapters through use of appropriate subheadings, in addition to the table of cases and legislation organised alphabetically by country at the start of the book, supplements the authors logical flow of defining and explaining key areas, which guides the readers' comprehension. The author keeps the text relevant and the language is elegant without being overly complex, with legalese explained in plain English where required, considering the intended audience includes law students in addition to, legal academics and practitioners.

### **Evaluation**

This book would be welcomed favourably by all intended readers, providing understanding and answers to ambiguities relating to conformity of goods and documents under the CISG. The text is well structured and informative. Each chapter is set out similarly in a recognisable structure, with a general overview or introduction commencing the chapter before a more detailed exploration of the chapters' topic is explained through the CISG, case law examples and commentary. The use of extensive case examples to explain the author's reasoning makes it easy for the reader to comprehend key points and concepts in detail. The summaries and explanations of cases are focused on the most crucial aspects of the text, which make it more practical for the reader to follow. This also alleviates the possibility of confusing and losing the reader in the case itself. The case summaries and information allows for understanding of crucial concepts in a straightforward manner.

### **Conclusion**

The book is an extremely useful resource. It is of significant assistance in understanding conformity of goods and documents under the CISG. Considering the importance and prominence of the CISG in international sales law, the book is recommended for clarity and understanding of these matters. The author's experience in this area of law is evident in his ability to explain and answer contentious

questions of law. This book serves its purpose well through a concise, yet detailed and informative approach.

Teresa Maines